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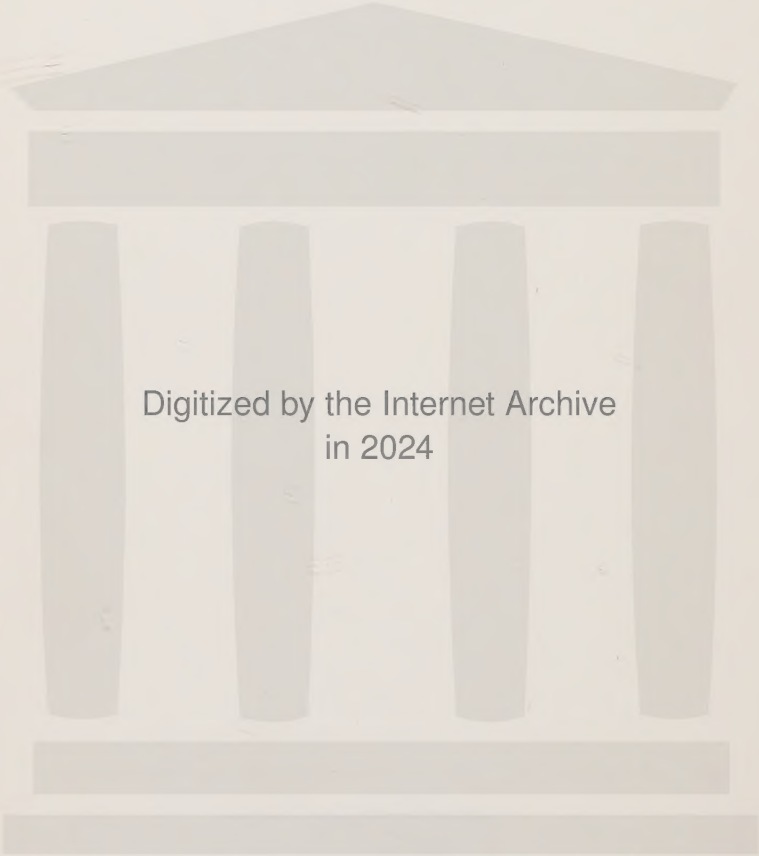
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THE LAW REPORTS

[1929] 1 Chancery

ISBN 0 406 09488 8

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1974

Reprinted by photolitho in Great Britain by
Compton Printing Ltd., London and Aylesbury

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

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1929.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1929.—1 Ch.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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ERRATA.

Page.	*Line*	*For*	*Read*
287	16 headnote	"was not a sewer which vested in the local authority, but that"	"was a sewer, but that"

Delete third paragraph of headnote and substitute:

"The plaintiff not having any personal right in the matter, the Court did not think it necessary or proper to make a declaratory judgment."

719	footnote (3)	"29 Ch. D. 531"	"29 Ch. D. 331."
721	footnote (2)		

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1929, will be as follows:—

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DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re MASON.

C. A.
1928
June 7.

[1927. M. 67.]

Limitations, Statute of—Lunatic—Fund in Court—Master's Certificate that no Heir at Law or Next of Kin—Bona vacantia—Ex gratia Grants—Indemnity from Recipients—Mistake of Fact—Claim by alleged Next of Kin—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16)—*Intestates Estates Act,* 1884 (47 *&* 48 *Vict. c.* 71), *s.* 3.

At her death in 1798 a lunatic was entitled to funds in Court representing the residuary estate of her father. In 1794 the Master had reported in the course of administration proceedings relating to the father's estate that the lunatic had no heir at law or next of kin, and the report was confirmed by the Court. In 1801 the Crown made ex gratia grants of all except 10 per cent. of the funds "subject . . . . to any claim or right of the next of kin," and took an indemnity from the recipients for securing repayment if any person should thereafter by due course of law prove himself to be the next of kin. In 1926 a petition of right was presented by persons claiming that the lunatic had left next of kin whom they represented and asking for payment to them of her personal estate.

The matter came before the Court for the determination of three questions, but on appeal the only question decided was whether the petition was barred by any Statute of Limitations:—

Held, that the Intestates Estates Act, 1884, s. 3, applied so as to entitle the Crown to rely by way of defence on any Statute of Limitations, that neither the form of the ex gratia grants nor the form of the indemnity operated to create a trust in favour of the next of kin, and therefore that the petition was barred by the Limitation Act, 1623.

Decision of Romer J. on this question [1928] Ch. 385 affirmed.

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APPEAL from a decision of Romer J. (1)

The following statement of the facts is taken from the judgment of Romer J.

Maria L'Epine died on April 30, 1798. At this date she was entitled to certain funds in Court representing the residuary estate of her late father, but subject to the payment of two annuities. In the year 1791 she had been found to be a lunatic, and in the course of certain proceedings in Chancery, instituted for the administration of her father's estate, the Master had, in July, 1794, reported that she had no heir at law or next of kin. That report was confirmed by the Court.

In these circumstances the Earl and Countess Howe obtained letters of administration of the estate of Maria L'Epine for the use and benefit of His Majesty King George III., and thereupon petitioned the Court for payment out to themselves as such administrators of the funds in Court, after appropriating a sufficient part thereof to answer the two annuities. An order was made on this petition on July 22, 1799, directing certain securities, of the nominal amount of 15,000*l.*, to be appropriated to meet the two annuities and directing payment to Lord and Lady Howe of the balance of the funds in Court.

It appears that Lord and Lady Howe had presented a memorial to the Lords Commissioners of the Treasury alleging that it had been the intention of Maria L'Epine's father to give them the beneficial interest in the property left to her by his will in the event of her death, and praying that the Commissioners would intercede with His Majesty to grant to them for their use and benefit the personal estate and effects of Maria L'Epine, subject to any claim of right of the next of kin of the said Maria L'Epine, if any should thereafter appear entitled in that capacity. Before any such grant was in fact made Lord and Lady Howe both died, and their only two surviving children—namely, Sophia Baroness Howe and Catherine, Marchioness of Sligo—were their legal personal representatives. These two daughters then presented

(1) [1928] Ch. 385.

a memorial to the Commissioners asking that, subject to the payment of 10 per cent. on the value thereof for His Majesty's use, they might be at liberty to appropriate the estate of Maria L'Epine to their own use in equal moieties. His Majesty's assent having been obtained to this proposal, the two daughters appear to have paid over the 10 per cent. to His Majesty, and thereupon, by Royal Warrant dated June 8, 1801, His Majesty granted to the two daughters, to be divided between them in equal moieties, the personal estate and effects of Maria L'Epine, to which His Majesty in right of the Royal Prerogative had become entitled, including the 15,000*l.* which was still in Court.

The habendum is in these terms: "To have, hold, take and enjoy the same with the said Baroness Howe and the said Marchioness of Sligo, their executors, administrators and assigns in as full, ample and beneficial a manner as we ourselves are or could or might have been entitled to have, receive or enjoy the same, subject nevertheless to any claim or right of the next of kin of the said Maria L'Epine, if any should hereafter appear entitled in that capacity to the said personal estate and effects, and as an indemnity to us, our heirs and successors against any such eventual claim, security has been given by or on behalf of the said Baroness Howe and Marchioness of Sligo."

The indemnity here referred to consisted of two bonds in penal sums for the purpose of securing repayment of the estate to His Majesty, his heirs and successors, if any person or persons whosoever should at any time or times thereafter by due course of law prove himself or themselves to be the next of kin of Maria L'Epine and for the purpose of indemnifying His Majesty, his heirs and successors, against all claims and demands which should or might at any time or times thereafter be made upon him or them for or in respect of the personal estate and effects of the said Maria L'Epine by any person or persons whomsoever, and also all loss, costs, damages and expenses which His Majesty, his heirs and successors, might at any time thereafter pay or sustain by reason of His Majesty's having given and granted the personal

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MASON, *In re.*

estate and effects to the Baroness Howe and the Marchioness of Sligo.

The two annuitants having died in 1818 and 1830 respectively, the 15,000*l.* was duly paid out of Court to persons claiming under the two daughters of Lord and Lady Howe under orders dated July 1, 1820 and March 8, 1831, respectively.

On July 1, 1926, this petition of right was presented by persons alleging that it had recently been established that Maria L'Epine did in fact leave next of kin surviving her, and that they now represented such next of kin. They accordingly sought to recover from the Crown with interest the whole of the personal estate of Maria L'Epine, or alternatively the 10 per cent. of such estate that was paid over to the Crown by the two daughters of Lord and Lady Howe.

The parties had agreed to confine themselves for the present to seeking a determination of the following questions: (1.) Whether the petition was maintainable on the assumption that no part of the funds in question ever came into the hands of or was dealt with by his present Majesty or his nominees or grantees or was carried to the Consolidated Fund. (2.) Whether the petition is barred by any Statute of Limitations. (3.) Whether in view of s. 5 of the Petitions of Right Act, 1860, the suppliants can proceed, without serving the petition upon the successors in title of the Earl and Countess Howe or Sophia Baroness Howe and Catherine, Marchioness of Sligo.

Romer J. held that the petition was really for money had and received, and was therefore barred by the Limitation Act, 1623 (21 Jac. 1, c. 16). On the other two points he expressed opinions in favour of the suppliants.

The suppliants (other than Lord Bangor) appealed.

There was also a cross-appeal by the Crown in regard to the other two points, but in view of the decision arrived at on the suppliants' appeal the Crown was not called upon to open the cross-appeal, but it was recognized that the points would remain open to the Crown if the case went to a higher Court.

Miss A. K. Mason (the first suppliant) in person. The effect of the Royal Warrant making the grant to the two daughters of Lord and Lady Howe and of the bonds of indemnity they were required to give was to create a trust in favour of the next of kin of Maria L'Epine. That trust was created by the Crown, and that being so the Crown cannot rely on the Limitation Act, 1623. Further, the Statute of Limitations has no application to a petition of right: *Rustomjee* v. *The Queen*(1); and see *Cayzer, Irvine & Co.* v. *Board of Trade.* (2)

J. M. Symmons for the other suppliants.

Sir T. Inskip A.-G. and *Stafford Crossman* for the Crown. Whether the view expressed in *Rustomjee* v. *The Queen* (1) be right or wrong, it has no application here, for the Intestates Estates Act, 1884, s. 3, expressly provided that a petition of right should not be presented "in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought . . . . against a subject." That section was reproduced by the Administration of Estates Act, 1925, s. 30, sub-s. 2, and extended to real estate; and s. 56 repeals the Act of 1884, but only so far as it applies to deaths occurring after the commencement of the Act of 1925. Owing to that limitation it is the Act of 1884 that applies here, and s. 3 makes it clear that the Crown can rely by way of defence on the Statute of Limitations. That being so, the question arises whether a trust was created by the Crown by reason of the grant to the daughters of Lord and Lady Howe being made subject to any claim or right of the next of kin and of the indemnity required of them. The Crown were clearly not express trustees, and it is submitted that there was no implied trust. The Crown did not take this property by virtue of any trust or confidence but as bona vacantia by virtue of a finding of the Master, confirmed by the order of the Court. It cannot be said in these circumstances that the Crown held even constructively on any trust. The fact that the Crown took an indemnity in

(1) (1876) 1 Q. B. D. 487, 491. (2) [1927] 1 K. B. 269, 294.

C. A. 1928 MASON, *In re.*

making the ex gratia grants cannot affect the matter. It is the invariable practice to take an indemnity on making such grants. There being no trust, this action, which is really for money had and received, was barred after six years by 21 Jac. 1, c. 16.

In the Court below the suppliants relied on *Brooksbank* v. *Smith* (1) as showing that time did not begin to run against the remedy for money paid in mistake of fact until the mistake was discovered. But that case is explained in *Baker* v. *Courage & Co.* (2); see also *Soar* v. *Ashwell* (3) and *In re Robinson.* (4)

[They were stopped.]

Miss Mason replied.

LORD HANWORTH M.R. The appeal must fail. I am tempted to say that I agree with the careful judgment of Romer J. and to add no more; but Miss Mason has argued in person, and out of deference to her argument I will deal with the question in issue but not by way of addition to anything that Romer J. said. The facts were fully stated by Romer J., and it is unnecessary to repeat them at any length. The case came before Romer J. on a petition of right presented by Miss Amy Knight Mason and other suppliants. Miss Mason appeals, and the other suppliants, who have also appealed, have agreed to abide the result of Miss Mason's appeal. I doubt whether it is open to the appellants to appear in this Court separately without giving separate notices of appeal. I merely mention this point so that this case shall not create a precedent. It may be that there ought to have been independent notices of appeal, but the appeal has been argued by the first suppliant, Miss Mason, seeking to obtain the distribution among all the suppliants of the property which formerly belonged to the estate of Maria L'Epine, who died unmarried and a lunatic in 1798. [His Lordship then stated the facts and continued.] The suppliants here say that they represent as descendants the next of kin of Maria L'Epine,

(1) (1836) 2 Y. & C. Ex. 58.
(2) [1910] 1 K. B. 56.
(3) [1893] 2 Q. B. 390.
(4) [1911] 1 Ch. 502.

and that when the Crown took her estate a trust was created in respect of it. I find myself quite unable to accept that argument. After the finding of the Master, which was confirmed by the Court, the title of the Crown to the estate was immediate and effective, the estate being bona vacantia. The Crown took and held as of right and not in trust for any person; and so far as the Crown yielded to the petition of Lord and Lady Howe or their daughters, the payments made to them were made ex gratia out of money belonging to the Crown. But it is said that as when the ex gratia payments were made bonds were taken from the recipients indemnifying the Crown in case any next of kin appeared, and no limit of time was fixed with regard to that, the Crown must be taken to have recognized some danger against which they had to be indemnified. I do not so read the bonds, but take the view adopted by Romer J. It was the ordinary course to require an indemnity for the sake of procedure, but the taking of these bonds does not exclude a time limit in regard to claims brought in respect of the property. The next of kin might appear within the limit of time fixed by the statute, and the words in the bonds "by due course of law" may well be taken to show that the indemnity was to apply if the next of kin appeared and proved their claim within the limit of time imposed by law. Therefore the argument that owing to the bonds the Crown must be treated as having created a trust in favour of the next of kin cannot prevail, and I hold, in agreement with Romer J., that there was no such trust created.

Maria L'Epine is now said to have had an Aunt Abigail, who did not die until 1811, and if so, she might have had a good claim in respect of Maria L'Epine's estate, which, on this view, ought not to have been treated as bona vacantia. But that right arose either at the date of Maria L'Epine's death or when the estate was in part distributed under the Royal Warrant of June, 1801, or in respect of the sum of 15,000*l.* kept in Court to answer annuities when the annuitants died and the money was paid out. And if this aunt had made a will she might have dealt in it with her

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interest as the next of kin of Maria L'Epine. It follows that the claim arose either in 1798, 1801 or 1831, and it cannot be said by the aunt's descendants claiming as next of kin in 1928 that their cause of action arose when in 1921 they discovered that there was an aunt of Maria L'Epine who died in 1811. Therefore it is a misconception to speak of rights arising at the present day, as the rights in fact were those which arose in favour of other persons who have long since passed away.

Another point taken in respect of Romer J.'s decision that the Statute of Limitations applied to bar any claim by these descendants of the original next of kin of Maria L'Epine was that the statute does not apply, and cannot be used by the Crown in defence of a petition of right, and for that proposition the authority was cited of *Rustomjee* v. *The Queen*. (1) In that case the question was not argued with the care it deserved, and the decision has been adverted to in later cases, and sometimes not favourably. But however that may be, it does not enable Miss Mason to establish her claim that the Statute of Limitations does not operate in the present case, because in the Intestates Estates Act, 1884, which was an Act to amend the law affecting the administration of the personal estate of deceased persons, it was provided by s. 3 that "After the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented, in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject." Applying that to the present circumstances, the petition of right was presented in respect of the estate of Maria L'Epine, who died in 1798. Then the section provides that a petition of right in respect of that estate cannot be presented except within the same times and subject to the same rules of law and equity in and subject to which an action for the like purposes might be brought by or against a subject. That plainly introduces

(1) 1 Q. B. D. 487.

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the Statute of Limitations (21 Jac. 1, c. 16); and therefore unless the petition is brought within six years of the cause of action arising the subject has no right to proceed with it. That section is repealed by the Administration of Estates Act, 1925, by means of s. 56 and Sch. II., but it is re-enacted with wider words, resulting in the inclusion therein of real estate. I am inclined to agree that s. 3 of the earlier Act governs this case for the reason which the Attorney-General gave in his argument; but whether it be s. 3 of the Act of 1884 that applies or s. 30, sub-s. 2, which replaces it in the Act of 1925, it is plain that the same limitations apply to the present case as if it was an action against a subject.

The statute thus made applicable is, as Romer J. has held, 21 Jac. 1, c. 16, which fixes the limit of six years for bringing actions. The only answer made by the suppliants to that is that they did not discover their right to make a claim until a much later date—1921. It is suggested by Miss Mason that it is only when she found proof of the marriage of Maria L'Epine's parents that she was entitled to bring this claim. A confusion seems to have arisen between the power to prove a claim and the right to bring it. The cause of action on which this claim is founded arose so far back as one of the three dates I have mentioned, 1798, 1801 or 1831, and the last of these dates is nearly 100 years ago. The fact that the useful evidence did not turn up until 1921 does not affect the date when the cause of action arose. It is unnecessary to cite a number of authorities on this point, and I will only refer to *Baker* v. *Courage & Co.* (1) There Hamilton J. held that when in answer to an action to recover money paid under a mistake of fact the defendant relied upon the Statute of Limitations, the statute must be taken to have run from the date of payment and not from the date of the discovery of the mistake nor from the date when the plaintiff might have discovered it by the exercise of reasonable diligence. This claim is therefore barred by virtue of the Intestates Estates Act, 1884, or the Administration of Estates Act, 1925, and the Statute of Limitations.

(1) [1910] 1 K. B. 56.

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There were two other points dealt with by Romer J. in his judgment which are the subject of a cross-appeal by the Crown. We have not called upon the Attorney-General to argue these points, but it will be open to him to make them if the case should go further. In the meanwhile it is sufficient to say that the appeal must be dismissed, and that there will be no order on the cross-appeal.

LAWRENCE L.J. I agree. In this case a petition of right was presented by certain persons based on an allegation that they had recently discovered that Maria L'Epine, who died in 1798, had left next of kin surviving her. The suppliants accordingly claimed as successors in title of the alleged next of kin to recover from the Crown the whole estate of Maria L'Epine or alternatively the 10 per cent. of that estate which was retained by the Crown with the consent of the daughters of Lord and Lady Howe. For present purposes it has been assumed that the suppliants represent the next of kin so alleged to have been discovered, and the parties to these proceedings have adopted the sensible course of having certain questions of law decided before embarking on a difficult and expensive investigation of the pedigree. The first question is whether the petition is maintainable on the assumption that no part of the funds in question ever came into the hands of or was dealt with by the present King or his nominees or grantees or was carried to the Consolidated Fund. The second question is whether the claim made by the petition is barred by any Statute of Limitations. And the third question is whether in view of s. 5 of the Petitions of Right Act, 1860, the suppliants can proceed with their petition without serving it upon the successors in title of the Earl and Countess of Howe and of Sophia Baroness Howe and of Catherine, Marchioness of Sligo.

Romer J. dealt first with the question whether the Statute of Limitations (21 Jac. 1, c. 16) operated to bar the suppliants' claim, and decided in favour of the Crown that it did. That decision was sufficient to dispose of the petition, but the learned judge in his judgment went on to express an opinion on the

two other questions in favour of the suppliants' contention. The formal order however only dealt with the point on the Statute of Limitations, and declared that the statute was a bar to the claim made by the suppliants. The suppliants thereupon gave notice of appeal, and one of the suppliants (Miss Mason) has argued the appeal on her own behalf. The Attorney-General has served a cross-notice of appeal so as to be able to present his contention on the two other questions in case this Court should consider that the decision of Romer J. on the first point was wrong.

This appeal has been argued solely on the point as to the applicability of the Statute of Limitations, and on that point I agree with the learned judge; I therefore abstain from expressing any opinion on the other two points.

The point under the statute stands in this way. Under the Intestates Estates Act, 1884, s. 3, a petition of right must be presented within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject. That Act is repealed by the Administration of Estates Act, 1925, but s. 30, sub-s. 2, of that Act has re-enacted s. 3 of the earlier Act with some slight additions, and s. 56 provides that the Acts mentioned in Part I. of the Second Schedule (amongst which is included the Intestates Estates Act, 1884) are repealed "only so far as they apply to deaths occurring after the commencement of this Act." In these circumstances it would seem that s. 3 of the Act of 1884 applies here, and that under that section the Crown is entitled to rely on any defence under the Statutes of Limitations.

The only Statute of Limitations suggested as applicable here is 21 Jac. 1, c. 16. The learned judge has held that the claim of the suppliants is a claim for money had and received, and has come to the conclusion (in my opinion rightly) that the cause of action was complete at the latest when the estate of Maria L'Epine was received by the Crown. He has assumed for the purposes of his decision (and the Attorney-General is content to have the same assumption made for the purposes of this appeal) that the Crown did in fact receive the whole

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fund. It was on such receipt that the cause of action was complete, for it was then that Maria L'Epine's maternal aunt, who is alleged to have been still living, could have claimed the fund. If so, it follows that if these proceedings are in effect proceedings for money had and received (as I agree they are) they were barred on the expiration of six years from the time when the Crown received the estate.

The only hope of escaping from this result is that the money was received by the Crown on trust for the next of kin, and it was argued by the appellant, although I confess that I was not able to appreciate the reasons upon which her argument was based, that a constructive trust was created, because the Crown demanded and obtained an indemnity from the persons to whom it paid over the bulk of the fund. I think the learned judge was quite right to negative the existence of any trust, either express or implied. The Crown claimed and received the fund on the footing that Maria L'Epine had died without leaving any next of kin. The Crown was fully justified in making this claim and in receiving the fund, because the pedigree had been inquired into by the Court, and a certificate had been made by the Master that there were no such next of kin. In the circumstances the Crown took possession of the estate of the intestate as being beneficially entitled to it, and consequently justified in making ex gratia payments out of it. The fact that on making such ex gratia payments the Crown required an indemnity to be given by the recipients does not show that it held the estate upon any trust. It is the regular practice of the Crown to exact an indemnity on making such ex gratia grants. It is in my opinion hopeless to contend that a trust for the next of kin ought to be implied merely from the fact that the Crown exacts an indemnity from its ex gratia grantees against the risk of some person thereafter establishing a claim against it as next of kin. The present case is a simple one, where the Crown has taken possession of an estate in the absence of any known next of kin and then has made ex gratia grants to persons out of such estate to persons thought to have some moral claim to it, at the same time taking an indemnity in case any next of kin

should thereafter establish a legal claim to the estate against the Crown. The only proper conclusion in this case is that the remedy of the suppliants, as the assumed representatives of the next of kin of Maria L'Epine, is barred. I agree therefore that the appeal should be dismissed.

RUSSELL L.J. I agree. The order of Romer J. from which this appeal is brought consists only of a declaration that the petition is barred by the relevant Statute of Limitations, which is 21 Jac. 1, c. 16. That was the only point argued before us on this appeal, and that point is fully discussed by Romer J. in the first part of his judgment. I am quite content with his judgment, and the reasons he has given for it are entirely satisfactory. I do not therefore desire to add anything to that judgment. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Langford, Borrowdale & Thain.*
Solicitor for the Crown: *Treasury Solicitor.*

H. C. G.

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[1927. S. 37.]

Mortgage—Principal and Surety—Charge by Deposit of Title Deeds—Charge by several Persons of their respective Properties to secure Sums becoming due to Chargee from a Company—Release by Chargee of one Property to Extent of allowing prior Mortgage—No Consent of other Depositors obtained —Discharge of all the Properties.

By a memorandum of charge dated February 2, 1924, twelve persons deposited the title deeds of their respective properties and certain policies of insurance to secure payment to the defendant of sums due or to become due from a company whose overdraft he was guaranteeing; and they respectively charged their respective properties with the repayment of these sums. In April, 1924, one of the depositors prevailed on the defendant to hand her the title deeds of three houses which she had deposited so as to enable her to raise money, and on June 7, 1924, she mortgaged the houses to a building society to secure a loan of 600*l.* and interest. In October, 1924, the company went into liquidation and the defendant became liable for the sum of 5000*l.* on his guarantee. In 1927, when the defendant proposed to realize the properties charged, other than the property released which he had since purchased, the plaintiffs, who were seven of the depositors, brought this action for a declaration that the securities deposited by them had been released from liability under the memorandum of charge by reason of the release of this other depositor's title deeds:—

Held, that the release of one property affected the right of any other depositor, whose property might be taken towards satisfaction of the company's debt to the defendant, to have all the properties marshalled so as to cause the debt to fall rateably on the properties charged. The defendant's act in handing over the deeds of the three houses had therefore brought about a substantial alteration in the contract connecting the parties inter se, and the properties of such of the plaintiffs as had not consented to the alteration were released from liability.

Decision of the Vice-Chancellor of the County Palatine of Lancaster affirmed.

Polak v. *Everett* (1876) 1 Q. B. D. 669; *Holme* v. *Brunskill* (1877) 3 Q. B. D. 495; and *Bolton* v. *Salmon* [1891] 2 Ch. 48 applied.

Appeal from the Vice-Chancellor of the County Palatine of Lancaster.

Smith Brothers (Burnley), Ld., were a private company formed with a capital of 10,000*l.* for carrying on business as builders. The shares in the company were held by the members of a family called Smith and the company had

obtained advances from their bankers, the Manchester and County Bank, secured by debentures of the company. In 1924 they were in need of further money, and the directors approached the defendant and asked him to guarantee an additional overdraft from the bank to the extent of 5000*l*. They informed him that the company had a total sum of about 34,828*l*. representing sums due on building contracts and retention money thereunder, and twelve members of the Smith family also agreed to deposit the title deeds of various properties and certain policies of insurance belonging to them individually for securing the payment to him of any money which should become due to the defendant from the company. This was carried out by a joint and several memorandum of charge dated February 2, 1924, of which the material clauses were as follows :—

" (1.) The title deeds and documents comprised or referred to in the First Schedule to these presents have been delivered and deposited by us the said Caroline Sophia Smith, John Smith, Helen Smith, Robert Smith, Agnes Smith, Emily Smith and Violetta Dracup to and with Edward Wood of Burnley aforesaid chartered accountant for securing to him the payment of all such sums of money as are now due or shall from time to time or at any time be due to him from Smith Brothers (Burnley), Ld., either for money advanced or paid or on any other account whatsoever together with all costs and expenses which may be incurred in respect of the premises.

" (2.) We the said Caroline Sophia Smith (as to the hereditaments comprised in the title deeds and documents first referred to in the First Schedule and as beneficial owner thereof) the said John Smith (as to the hereditaments comprised in the title deeds and documents secondly referred to in the said First Schedule and as beneficial owner thereof) the said Helen Smith (as to the hereditaments comprised in the title deeds and documents thirdly referred to in the said First Schedule and as beneficial owner thereof) the said Robert Smith (as to the hereditaments comprised in the title deeds and documents fourthly referred to in the said First Schedule

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and as beneficial owner thereof) the said Agnes Smith (as to the hereditaments comprised in the title deeds and documents fifthly referred to in the said First Schedule and as beneficial owner thereof) and the said Emily Smith and Violetta Dracup (as to the hereditaments comprised in the title deeds and documents sixthly referred to in the said First Schedule and each as beneficial owner of one undivided moiety of such last mentioned hereditaments) do hereby respectively charge the said hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due from Smith Brothers (Burnley), Ld., to the said Edward Wood as aforesaid."

By clause 3 Samuel Smith, John Smith, Robert Smith, Albert Edward Smith, George Smith and Bramley Smith similarly charged their respective properties comprised in title deeds and documents referred to in the second schedule, but subject in these cases to existing mortgages thereon.

In clause 4 the depositors undertook to execute legal mortgages when called upon, and in clause 5 appointed Edward Wood the attorney of them and each of them to perfect any such mortgage or any deed, assurance or act required on any sale by him of the said hereditaments or any part thereof under the power of sale applicable thereto.

In clause 7 the depositors declared "that the said Edward Wood may grant time or other indulgence to or compound with Smith Brothers (Burnley), Ld., aforesaid or their assigns without discharging or affecting this security." And in clause 8 certain policies of insurance and securities comprised in or referred to in the third schedule were stated to have been deposited by way of further security.

On February 6, 1924, the defendant signed the guarantee to the bank. In May, 1924, Mrs. Caroline Sophia Smith, who had deposited the deeds of three copyhold houses in Smalley Street, Burnley, prevailed on the defendant to give her back the deeds so that she might raise money on them for the purpose of fitting out her son, who was going to South Africa. By a mortgage dated June 7, 1924, and a surrender of even date she assured these houses to trustees

for the Borough Land and Building Society, Ld., to secure a loan of 600*l.* and interest.

In October, 1924, the company went into liquidation and the defendant became liable on his guarantee to the full extent of 5000*l.* In 1927 the defendant bought the three houses from Mrs. C. S. Smith, the mortgage debt of 600*l.* was paid off, and a vacating receipt executed by the building society.

The defendant having announced his intention of realizing the deposited securities seven of the depositors commenced this action on October 10, 1927, claiming "a declaration that the said Memorandum of Charge has been discharged and that the plaintiffs and the securities deposited by the plaintiffs with the defendants on the execution of the said Memorandum of Charge have been released from all claims demands and liability under the said Memorandum of Charge by reason of the release by the defendant of the title deeds deposited by the said Caroline Sophia Smith on the execution of the said Memorandum of Charge from liability thereunder or otherwise." And they asked for delivery up of the documents deposited by them and delivery up of the memorandum of charge to be cancelled.

There was a counterclaim which does not call for mention in this report.

The Vice-Chancellor, after pointing out that the action was a very ungracious one, said that in his view the memorandum of charge had the effect of putting the signatories in the position of co-sureties for the company's debt to the defendant, and amounted to a contract that each of the properties scheduled to that document should be and continue available as security for the debt. The release by the defendant of any one of the securities was an interference with the contractual right of the other sureties and therefore released them absolutely and entirely, except in the case of the plaintiff John Smith, who had acquiesced in the release. John Smith had died since action brought, but his estate was debarred from obtaining any relief in the action.

The defendant appealed.

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Cyril Atkinson K.C. and *Montgomery* for the appellant. The Vice-Chancellor was wrong in treating this as a case of joint and several guarantee. Sureties are persons who undertake a personal liability, but here the twelve members of the Smith family merely deposited the title deeds of property to secure the company's debt to the appellant. The effect was that there were a series of pledges, but no joint liability. But even if the same principle applies here by analogy as in cases of principal and surety, the surety is at most only entitled to be released if the original contract of guarantee is varied by the release of a co-surety so as to affect his rights. The Vice-Chancellor said that in that case the surety was entitled to an absolute release, and he relied on *Bolton* v. *Salmon* (1) as showing that it applied to the present case. But *Bolton* v. *Salmon* (1) only decided that in the case of a guarantee by co-sureties who both incurred personal liability and gave security, if the person to whom the guarantee was given did something which freed the sureties then he lost the benefit of the securities also. There is no authority that the same applies to a deposit of different properties by way of security without any personal liability being incurred by the depositors. Moreover each property deposited is only liable for its fair and reasonable proportion of the total liability, and the release of one property does not affect the liability of the other properties : *Margrett* v. *Gregory*. (2) In order that a surety may be released there must be some interference with his rights : *Polak* v. *Everett*. (3) Here there is none. If the appellant is treated as having received the proper proportion in respect of Mrs. Caroline Smith's property and he is content to be so treated, the other depositors are uninjured, for their liability remains as before.

[They were stopped.]

Sir H. Cunliffe K.C. and *Ernest C. C. Firth* for the respondents. This case is clearly within the definition of suretyship in Rowlatt on Principal and Surety, p. 1. Moreover the rights of the co-depositors have been affected by the release of Mrs. Caroline Smith's deeds. Under the memorandum of

(1) [1891] 2 Ch. 48. (2) (1862) 6 L. T. 543.
(3) 1 Q. B. D. 669, 675.

charge each depositor's property is made liable for the entire debt of the company to the defendant. The release of one property therefore increases the risk of each of the other properties to be made liable for the entire debt, if of sufficient value. Moreover in such a case there would be a right in the depositor whose property was so made liable to marshalling so as to cast the burden rateably on all the properties, and the defendant, in freeing at any rate in part Mrs. C. Smith's property, has increased the burden on the other properties. It is sufficient to say that the plaintiffs' contractual rights have been affected, and it is immaterial to what extent the nature of the bargain has been altered, for it is a matter for the other depositors to say whether they will allow it to be altered at all and yet remain bound: *Bolton* v. *Salmon* (1); *Polak* v. *Everett* (2); *Holme* v. *Brunskill.* (3)

[They were stopped.]

Montgomery in reply. The plaintiffs have not had their contractual position altered. They will be entitled to treat the defendant as having realized Mrs. Caroline Smith's property (as he was entitled to do), and so to have paid himself in part. No doubt an indulgence given to the principal debtor would have exonerated the sureties but for clause 7 of the memorandum of charge, but that has never been extended to an indulgence given to one of a number of co-sureties and still less to a case of co-depositors where the only right as between the depositors is the equitable right of marshalling: *Taylor* v. *Bank of New South Wales.* (4)

[LORD HANWORTH M.R. In that case the sale under discussion was within the powers of the mortgagors.]

In the present case also there is a power of sale.

[RUSSELL L.J. The defendant by handing over the deeds of her houses to Mrs. C. Smith and enabling her to raise 600*l.* must have affected the co-depositors' right to marshalling.]

No injury was suffered until it was proposed to realize the securities, and by that time the defendant was in a position to treat Mrs. Smith's property which he had acquired as

(1) [1891] 2 Ch. 48.
(2) 1 Q. B. D. 669, 675.
(3) 3 Q. B. D. 495.
(4) (1886) 11 App. Cas. 596, 602.

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included in the memorandum of charge. Whenever there is not a formal release by deed a question of intention arises: *Ex parte Good.* (1)

[LORD HANWORTH M.R. That seems contrary to *Holme* v. *Brunskill.* (2)]

Different principles apply to a release by the creditor of a co-surety from those applicable to a release by him of the principal debtor. All that has been done here is to affect the equitable right of marshalling, and not to affect or vary the original contract; at most therefore the co-depositors are only entitled to be released pro tanto: *In re Wolmershausen.* (3)

[RUSSELL L.J. referred to *Ward* v. *National Bank of New Zealand.* (4)]

That was a case of co-sureties and not co-depositors.

LORD HANWORTH M.R. This is an appeal from a decision of the Vice-Chancellor of the Palatine Court, delivered on April 24, 1928. I desire to associate myself with the measured language of the Vice-Chancellor where he says: "The action in my opinion is a very ungracious one." He then goes on to recall the facts, which were proved before him, and says: "The defendant in his evidence said the directors begged him with tears in their eyes to guarantee the overdraft, and when Mrs. Caroline Smith (who had recently become a widow) asked him to release her deeds to enable her to fit out her son who was going to South Africa, he says he could not resist her importunity." Those observations of the defendant to which the learned Vice-Chancellor calls attention arise on the facts of the case. [His Lordship then stated the facts, and after referring to the material parts of the memorandum of charge, continued:] It is said by the plaintiffs that as a result of the kindness shown by the defendant to Mrs. Caroline Smith he has altered the position under the contract entered into by them so as to discharge them. What they say, stated in simple language,

(1) (1877) 5 Ch. D. 46, 59.
(2) 3 Q. B. D. 495.
(3) (1890) 62 L. T. 541, 546.
(4) (1883) 8 App. Cas. 755.

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is that the defendant by allowing Mrs. Caroline Smith to take away the title deeds of her properties, which stood charged under clause 2 of the memorandum of charge with the repayment of all moneys due to him from Smith Brothers (Burnley), Ld., has altered their position, with the consequent discharge of all their properties from the charge created by that document. Now I think it is quite clear that supposing there had been separate deeds under which each of the parties to the deed of February 2, 1924, had separately and independently deposited and charged his or her property with the repayment of this money, any other person who had as surety undertaken a similar responsibility would have been entitled to the benefit of the deposited securities, even though he had not had notice of them. In *Pearl* v. *Deacon* (1) this proposition is stated, and I think rightly stated, in the headnote: "A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not." That right of the surety is due to the inter-relation between those incurring responsibility to the same creditor in respect of his debts. In the present case the parties to this deed stood in this position. There were a number of persons—I will say ten persons, although I believe there were more than that—who contributed certain properties which were to stand as security for the possible debt. They did not enter into any personal liability, but their respective properties stood charged with the repayment of the debt. Moreover each of those properties was charged with the whole debt, because the words of clause 2 are: "do hereby respectively charge the said hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due." Thus the creditor could have come down upon one or other of these properties and sought repayment of the whole debt out of that property. It is not contested, indeed, it is conceded, that if that had been done there would have been a right on the part of the owner of the property out of which payment had been obtained to have all the properties charged marshalled so that the

(1) (1857) 24 Beav. 186.

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burden fell rateably upon those who joined in the deed. It appears to me impossible to say that if one of those properties is withdrawn, so that the risk of the creditor coming down upon the other properties is increased, there is no change in the nexus which connects the parties and the rights of the parties inter se. While the properties provided by all ten persons stood liable respectively for the debts, the chance of the creditor coming down on any one person's property was, so to speak, distributed over ten persons. When one person's property has been withdrawn the chance is distributed over nine persons only. That was the result and effect of what the defendant did in the kindness of his heart in response to the tears of Mrs. Caroline Smith in April, 1924. He has thus altered the position, the responsibility, and the rights of those whose properties remain subject, or apparently subject, to the deed of February 2, 1924.

In *Holme* v. *Brunskill* (1) it was laid down in a considered judgment of Cotton L.J., on facts which raised the point very precisely, that it is not necessary to inquire what the extent of the alteration is. Cotton L.J. says: "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented

(1) 3 Q. B. D. 495, 505.

he will be discharged." Applying that rule to the present case, I come to the conclusion that inasmuch as these ten persons had inter se the right of marshalling and that there are now only nine of them left owing to the property of one of them being withdrawn, their rights inter se have been affected; it may be that they are very little affected, but it was for them to judge and for them to decide whether they would allow the alteration, and it is not for a Court or a jury to determine the materiality of the alteration. The result of the alteration was not really large in this case, but the contributing person is to be the sole judge of whether or not he will consent to remain liable notwithstanding the alteration. There was no such consent here, and it appears to me therefore that the learned Vice-Chancellor has come to a right conclusion, although with reluctance.

Let me refer also to *Bolton* v. *Salmon* (1) where Chitty J. followed and applied the rule in *Holme* v. *Brunskill* (2), which in itself followed the rule stated by Lord Loughborough in *Rees* v. *Berrington*. (3) The rule stated by Lord Loughborough was: "It is the clearest and most evident equity not to carry on any transaction without the privity of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." In *Bolton* v. *Salmon* (1) Chitty J. applied the rule by holding not only that the surety was discharged from personal liability, but also that the security which had been put up by him was discharged. Shortly after quoting from Lord Loughborough's judgment, he says in his judgment: "This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him." If, therefore, a difference is sought to be drawn between the present case and the other cases to which I have referred, in the sense that what is contributed here are securities and not a personal liability, it appears upon the statement of

(1) [1891] 2 Ch. 48, 54. (2) 3 Q. B. D. 495.
(3) (1795) 2 Ves. Jun. 540, 543.

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Chitty J. that we ought to apply the same reasoning as in the case of a personal liability.

The reasoning of the cases I have cited appears to be that where such an agreement has been entered into as that contained in the deed of February 2, 1924, it is not possible for the creditor to make a particular and separate bargain with one of the other parties releasing the security put up by him from liability without the consent of the other parties to the deed, whose rights inter se and whose responsibility in respect of the sum for which they were making their properties liable was or might be altered by reason of that separate bargain. For this reason I have come to the conclusion that the judgment of the learned Vice-Chancellor is right and the appeal must be dismissed. I regret, however, as I said in opening my judgment, that I have to come to this decision, and I regret the nature of the action, in company with the learned Vice-Chancellor.

SANKEY L.J. I agree. In effect the argument of the appellant is that the parties to the deed of February 2, 1924, were not sureties; that there was no personal obligation upon them and no joint liability; and therefore that it is a confusion of thought to rely on the cases which refer to releases of sureties, because here there was no personal liability to be released. In my view it is important, before coming to the law, to have regard, first, to the terms of the deed of February 2, 1924, and, secondly, to the position at the time that the defendant handed back her deeds to Mrs. Caroline Smith. As to the first of these matters, it will be observed that the deed in clause 1 states that the title deeds and documents comprised in the schedule, which contains those which belonged to Mrs. Caroline Smith, "have been delivered and deposited by us . . . . to and with Edward Wood . . . . for securing to him the payment of all such sums of money as are now due or shall from time to time or at any time be due to him from Smith Brothers (Burnley), Ld." Clauses 2 and 3 are still more important, because the parties to the deed do "hereby respectively charge the said

hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due from Smith Brothers (Burnley), Ld., to the said Edward Wood as aforesaid." Now when the defendant handed over the deeds which belonged to Mrs. Caroline Smith, the other depositors, including the plaintiffs in this action, lost the chance of his proceeding against Mrs. Caroline Smith's property for the whole debt. His action, which was not a negligent action, but a voluntary one, affected the right of the other parties to the deed, and I adopt the language of the learned Vice-Chancellor in his judgment where he says: "In the present case the original contract of the sureties is the charge of the 2nd February, 1924, which in my view amounts to a contract that each of the properties scheduled in that document should be and continue available as security for the debt. The release by the defendant of any one of the securities is an interference with the contractual rights of the other sureties." Without adopting the word "sureties," I prefer to say: "The release by the defendant of any one of the securities is an interference with a contractual right of the other parties to the deed"; but, although it may be that strictly speaking these persons were not sureties, I think the principles of law which have been applied in the surety cases are applicable in the present circumstances.

In *Polak* v. *Everett* (1), decided in 1876, we have the opinion of a great common lawyer, Lord Blackburn. In the course of the argument he said: "There is a great distinction between a negligent act injuring the surety and an intentional act which injures him." Later in the argument Lord Blackburn puts the views of Lord Eldon in *Samuell* v. *Howarth* (2), where that distinguished Chancellor says: "If there be an alteration of the rights of the surety, though only nominal, and for his benefit, he is discharged." The reply to that by the learned counsel arguing the case was: "Where time is given, or the agreement varied in respect only of part of the debt or security, the rule does not apply";

(1) 1 Q. B. D. 669, 672. (2) (1817) 3 Mer. 272.

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and Blackburn J., as he then was, said: "This point is quite new to me." Those were only statements in argument, but they will be found also in the judgment of Blackburn J., to which I need not refer. That being the opinion of a great common lawyer, we have in *Holme* v. *Brunskill* (1) the opinion of a great Chancery lawyer, Cotton L.J., in the passage already read by my Lord, to which I need not again refer. It is quoted in nearly every text-book on this subject. It is to the effect that if the surety is not consulted with reference to an alteration of the contract guaranteed, then, unless it is self-evident that the alteration is unsubstantial, the surety will be discharged. Mr. Montgomery, however, contends that this is an exceptional case in which the rule in *Holme* v. *Brunskill* (1) and *Polak* v. *Everett* (2) does not apply, and for authority as to that he refers to *Taylor* v. *Bank of New South Wales* (3), which was decided in 1886. Lord Watson, who was giving judgment, said: "In that event, the present case would not have been within the principle of *Polak* v. *Everett* (2) and *Holme* v. *Brunskill* (1), which were relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor, without the consent of the surety, who was held to be wholly discharged, on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed." The learned Law Lord there points out the difference in the facts, and the headnote shows where *Taylor* v. *Bank of New South Wales* (3) differed in the facts from those two cases. The headnote states: "The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection." It

(1) 3 Q. B. D. 495, 505. (2) 1 Q. B. D. 669, 672.
(3) 11 App. Cas. 596, 602, 603.

was held that "On the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby." Again Lord Watson says in the course of the argument: "Was it not within the contract contained in the mortgage and contemplated by the sureties?" and Mr. Lumley Smith, in the course of his argument, "contended that the evidence shewed that the sale took place under such circumstances as were contemplated by the deed and the contract of suretyship." That was the view accepted by the Privy Council and it at once distinguishes *Taylor* v. *Bank of New South Wales* (1) from *Polak* v. *Everett* (2) and *Holme* v. *Brunskill*. (3)

Finally, it is only necessary in my view to look at *Bolton* v. *Salmon* (4), because if that case is carefully investigated it is seen to be on all fours with the present case, and, unfortunately for him, against the appellant. The argument for the appellant here being that the parties to the deed were not sureties, that there was no personal obligation, no joint liability, it is important to look at the argument advanced in the case of *Bolton* v. *Salmon* (4) for the unsuccessful claimant, which was exactly the argument put forward here on behalf of the appellant. Mr. Byrne, who appeared for the plaintiff, contended: "The fact that the defendant's personal liability on the covenant in the mortgage of the 4th of September, 1857, has been released by giving time to the principal debtor, does not necessarily release the securities mortgaged by that deed, and which are now vested in the plaintiff." Mr. Jason Smith, for the defendants, contended: "On principle and on authority the surety is released by giving time to the principal debtor by transactions to which the surety is no party, and this release extends not only to the surety's personal liability on the covenant, but also to the property charged." Chitty J.,

(1) 11 App. Cas. 596.
(2) 1 Q. B. D. 669.
(3) 3 Q. B. D. 495.
(4) [1891] 2 Ch. 48, 51, 53, 54.

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in giving his judgment, calls attention to the fact that the plaintiff's counsel contend that: "although Miss Buckenham's covenant is gone, by reason of time having been given to the principal debtor, the security which she gave remains." Then the learned judge continues: "With all their learning and research, the plaintiff's counsel were not able to produce any authority for this proposition. The reason may be, that no one has ever previously thought of raising such a contention." May I say this is the second time the contention has been raised, and raised in my view unsuccessfully. The learned judge points out, as my Lord has already pointed out: "This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him." Now although that was a surety case, it was on all fours with the present case, because the personal liability had gone and only the documents remained, as indeed in the present case, where there is no personal liability and only the deposit of the deeds. Therefore I have come to the conclusion, for the reasons that my Lord has given and for the reasons that I have endeavoured to give, that this appeal should be dismissed.

I also should like to say I very much regret having to give this decision, and if I could have seen my way to do it I personally should have liked to give it the other way.

RUSSELL L.J. I agree, and I also desire to associate myself with what has fallen from the Vice-Chancellor, the Master of the Rolls, and Sankey L.J. with regard to the nature of this action and its ungraciousness. Indeed, if I were in a position of greater freedom and less responsibility, I should use the word "discreditable." None the less, we are bound to decide in accordance with what we believe to be the true legal rights of the parties, and in my opinion this appeal fails. I will endeavour shortly to state the reasons which have forced me reluctantly to come to that conclusion. The question of release in this case arises not in consequence of any transaction which has taken place between the debtor and the creditor; that is to say between

the company and the defendant. It arises solely in consequence of a transaction which took place between the defendant and one of the co-mortgagors. The question for our determination is, has that transaction or dealing between those two parties operated to release the property of the other co-mortgagors from their obligation to indemnify the defendant from the unpaid liability to him of the company? The bank has been mentioned in this case, but the bank really only comes in as a matter of history. It was the guarantee given by Mr. Wood to the bank which was the cause of the deed poll of February 2, 1924, being executed. The effect of that deed poll is that the twelve parties to it, each provided some property of his or her own as a security to indemnify Mr. Wood against any liability to him of the company which the company was unable to pay.

In considering the legal position of the co-mortgagors under the deed in question, two points must be borne in mind. The first is that there is no personal liability of any sort or kind imposed upon them by the deed. The second is this, that each person's property became liable as between him and the defendant Wood for the whole of the company's indebtedness to Wood. One consequence of that was that as between himself and each party to the deed Wood was entitled to repay himself the amount of the company's indebtedness to him by the sale of any one of the properties mortgaged to him. Another consequence of the deed is that if in point of fact Wood repaid himself the indebtedness of the company by selling the property of one only of the parties to the deed, that person whose property has been applied in payment of the whole of the company's indebtedness would be entitled, as between himself and the other mortgagors, to have all the properties marshalled so as to distribute the entire burden among them in an equitable manner. I think as to those propositions there has been no dispute between the parties in the present litigation.

That being so I have to consider what the legal position is, bearing in mind that this is not a case where the surety is said to have been discharged by reason of some transaction

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or dealing between the creditor and the principal debtor, but one where the question is whether several persons in a position analogous to that of co-mortgagors has been discharged by reason of some dealing or transaction with a co-mortgagor. Speaking for myself, I do not wish to investigate further than the opinion stated by Stirling J. in *In re Wolmershausen.* (1)

After referring to certain other cases he says: "The question there is as to the effect of an agreement entered into, not between the creditor and the principal debtor, but between the creditor and one of several sureties. The cases appear to show that the creditor (1.) must not act in a manner inconsistent with the contract or arrangements under which the obligation of suretyship was incurred; and (2.)"—it is the latter which is relevant to the present case—"must not act so that the right of contribution between the co-sureties is destroyed or prejudiced." Now in the present case there is no right of contribution, because there was no personal liability attaching to the parties to the deed; but there was a right equivalent to contribution in regard to the liabilities of their properties, and that was the equitable right of having the properties marshalled. In regard to that, it is pointed out in *Ward* v. *National Bank of New Zealand* (2), that the interference with such a right is not an interference with the contract between the parties but an interference with a right conferred by equity. It is pointed out in the judgment in that case: "Where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, the surety cannot therefore claim to be released on the ground of breach of contract. It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon contract but on principles established by Courts of equity." Then the judgment proceeds on the next page: "The claim of a several surety

(1) 62 L. T. 541, 545.

(2) 8 App. Cas. 755. 765, 766.

to be released upon the creditor releasing another surety, arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim,"—that is in order to support his claim that he has been released—" must shew that he had a right to contribution, and that that right has been taken away or injuriously affected." Now, as I have already said, this is not a case where there is a right of contribution. But the position appears to me to be exactly the same in cases where, instead of persons having joined in becoming personally liable, several persons have joined to constitute a fund by charging their several properties, out of which a certain liability can be met. The right that there arises is not a right of contribution, but a right to marshal; that is the right which adjusts matters inter se.

I have now to consider whether the defendant in entering into the transaction with Mrs. Caroline Smith, which took place subsequently to the date of the memorandum of charge, acted so that the right of marshalling as between these co-mortgagors was destroyed or prejudiced. Now what was the act that was complained of? To ascertain that I turn to the evidence, and I find from Mrs. Caroline Smith's evidence that she went to the defendant and told him she wanted her deeds back so that she could raise money on them, that he handed her back her deeds in order that she might do this, and that she did raise money on them to the extent of 600*l.* immediately after she received the deeds back. It has been said by Mr. Montgomery, and quite rightly said, that in the document we are considering there is a charge by Mrs. Caroline Smith of her property, and that, although the deeds were handed back to her, the defendant never executed in her favour a release of her property from the charge, so that it is true to say that the property strictly remained still subject to a charge. The defendant executed no release, but he acted in such a way as to enable her to put in front of his rights and in front of the rights of the co-mortgagors under the doctrine of marshalling a sum of 600*l.* When once one realizes that

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this was the act that he did, and that this was its effect, then in my opinion there can be only one answer to the question whether the act which he did was such that the several mortgagors were prejudiced in regard to their right of marshalling. The answer, in my opinion, must clearly be Yes. But I am not satisfied on the authorities that it would be strictly necessary even to establish actual prejudice. The arrangement with Mrs. Caroline Smith was a matter done behind the backs of the other mortgagors, and if it might in any way affect their position they ought to have been consulted. As they were not consulted, in law, in my opinion, their properties are discharged from liability under the deed of charge. For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Southern, Ritchie & Southern, Burnley; Steel & Mackrell, Burnley.*

H. C. G.

WELD *v.* PETRE

[1927. W. 2390.]

C. A.
1928
RUSSELL J.
March 14, 15, 16, 21; *April* 2.
C. A.
June 29; *July* 2, 3, 16.

Mortgage—Deposit of Shares to secure Loan—Interest not paid—Shares retained by Mortgagee—Dividends received more than sufficient to repay Loan with Interest—Redemption Action—Time Limit—Analogy of Statute of Limitations—Claim to Balance of Dividends—Personal Order for Payment, whether obtainable by originating Summons—Form of Order—Rules of the Supreme Court, Order LV., *r.* 5A.

In order to secure a loan of 1000*l.*, repayable with interest in three months, shares in a limited company were deposited with a mortgagee. The loan was not repaid. Twenty-six years later a claim to redeem the shares was made on behalf of the mortgagor. At that date the mortgagee and his executors, who still held the shares, had received in dividends more than sufficient to repay the 1000*l.* with interest from the date of the loan:—

Held, by the Court of Appeal (affirming the decision of Russell J.), that the twelve years rule by analogy to the Statute of Limitations was not applicable to proceedings for the redemption of a mortgage of personalty.

Mellersh v. *Brown* (1890) 45 Ch. D. 225; *In re Powers* (1885) 30 Ch. D. 291; *London and Midland Bank* v. *Mitchell* [1899] 2 Ch. 161; *In re Stucley* [1906] 1 Ch. 67 applied.

Held also, that the considerations which applied to applications by a mortgagor to redeem were not the same as those which applied to applications by a mortgagee to foreclose, and that, unless a mortgagor's right to redeem had been destroyed by statute, foreclosure, sale, or release, equity ought not to deprive him of the right provided that when it was asserted three circumstances co-existed—namely, the debt had been or could be paid, the security was available, and no one's position had been altered in the meantime.

Held further, that the delay that had taken place in the present case was not in itself sufficient to disentitle the mortgagor's representatives to relief.

Held also (reversing the decision of Russell J.), that there was nothing in r. 5A of Order LV. which prevented the Court on an originating summons from making a common redemption order against a mortgagee in possession which contained a personal order on him to pay to the mortgagor the amount which should be certified to be due from him in excess of the amount due for principal, interest, and costs.

ORIGINATING SUMMONS.

This was an application to redeem by persons claiming to be entitled to the equity of redemption in certain shares in a limited company, the defendants being the executors of the mortgagee. The defendants admitted that there was

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no Statute of Limitations to bar the right to redeem, but said that owing to the delay and laches of the applicants, either their right to redemption had been lost or the Court should withhold its assistance by refusing to order redemption.

The following statement of the facts, as found by the Court, is taken from the judgment of Russell J.:—The shares in question were originally three hundred ordinary shares of 5*l.* each fully paid in the Cornbrook Brewery Company, Ld. These were the property of Henry Weld-Blundell, who in February, 1900, mortgaged them to Joseph Francis Lescher, to secure a loan of 1000*l.* for three months with interest at 6 per cent. The shares were registered in the mortgagee's name on December 10, 1900. Henry Weld-Blundell died on September 5, 1901. His legal personal representatives were his widow, the plaintiff, Herbert Joseph Weld, and William Dalglish Bellasis. Apparently the executors were unable or unwilling to pay off Mr. Lescher's 1000*l.*, and in July, 1902, they offered him two hundred further shares as additional security. He accepted this offer, and two hundred further shares were registered in his name on August 14, 1902. The estate of the mortgagor proved in fact insolvent, but his brother Charles Weld-Blundell, who was a large creditor, came to the rescue and took over some of the assets at the value of 8534*l.* He then proceeded to settle those assets for the benefit of his brother's widow and daughter. The settlement was dated September 1, 1902. Among the assets so acquired and settled were the five hundred shares subject to the 1000*l.* mortgage; but the mortgage was incorrectly described in the settlement as carrying interest at 5½ per cent. The trustees of the settlement were and are the present plaintiffs. Among the assets so acquired and settled were further parcels of ordinary shares in the same company, of which some were and some were not subject to mortgages. The interest which fell due to Mr. Lescher on August 5, 1902, was not punctually paid, and as a result Mr. Lescher obtained further security from the trustees, in pursuance of a power contained in the settlement, to the extent of another hundred shares, which

were registered in his name on October 16, 1903. He was now mortgagee of six hundred shares of 5*l.* each. A dividend at the rate of 2 per cent. per annum, less tax, received by Mr. Lescher, cleared the interest on the loan up to February 5, 1904. By means of similar dividends received by him interest was cleared up to February 5, 1908. In 1908 Mr. Lescher became desirous of having his loan repaid, because, according to his letters, having been appointed chairman of petty sessions, he did not wish to be a holder of brewery ordinary shares. A correspondence ensued, in which Mr. Lescher threatened to sell and to take legal proceedings, and which culminated in a letter of June 18, 1908, from him to the solicitors for the trustees in the following terms: "I have your letter of the 15th inst. The course you therein recommend will incur further 'pour parlers' which is not my intention—and I mean acting promptly, and at once however unpleasant such a course may be."

Mr. Lescher, however, did nothing at all. He never at any time either sold or foreclosed. For the next six or seven years the matter seemed to have slept. Bad times came to the company and no dividend was paid on its ordinary shares, nor was there any trace during this period of Mr. Lescher demanding or receiving interest on the 1000*l.*

During the war prosperity came to the brewery, and in respect of the year 1916 and succeeding years down to the present time substantial dividends free of tax had been paid on the ordinary shares. These dividends were received and retained by Mr. Lescher. In 1920 the six hundred shares of 5*l.* each were sub-divided into three thousand shares of 1*l.* each, and fifteen hundred bonus shares were allotted to Mr. Lescher, with the result that he then held four thousand five hundred fully paid shares of 1*l.* each. By 1921 the dividends received by the mortgagee were sufficient to pay off the loan. The continued prosperity of the company was well known to both the trustees of the settlement. They held other ordinary shares therein, and the plaintiff, Herbert Joseph Weld, had throughout been a director of the company.

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At the end of 1922, or early in 1923, it occurred to some one that Mr. Lescher's loan must or might have been satisfied out of the Cornbrook dividends, and on January 5, 1923, the plaintiff, Francis Joseph Weld, one of the trustees and the solicitor for the trustees, wrote a letter addressed to Mr. Lescher. When he wrote the letter he had not investigated the figures, but he thought the loan had been paid off. Further he did not then realize the exact legal position. The letter ran thus: "Adverting to the advance made by you to the late Mr. Henry Weld-Blundell on security of some Cornbrook shares it has been suggested to me by one of the family that I should approach you in the matter in view of the fact that by this time your debt must have been largely reduced if not paid off out of the dividends. Would you be prepared to transfer the shares back to Mrs. Henry Weld-Blundell and her daughter on payment of the principal due together with a reasonable rate of interest over the whole period during which the debt had run? As you are no doubt aware Mrs. Henry Weld-Blundell and her daughter are not well off, and I shall be glad if you will give the matter your consideration." Mr. Lescher never received that letter. He died on January 7, 1923. The letter was answered by his daughter, who said the matter was for the executors and lawyers, whose address she gave.

The defendants were the executors of Mr. Lescher, and they proved his will in April, 1923. It did not appear that the letter was brought to their attention. In 1923 the company issued further bonus shares, with the result that two thousand two hundred and fifty ordinary shares were added to Mr. Lescher's holding. The three hundred shares of 5*l.* each, which were the subject of the original mortgage, had thus increased and multiplied until they were represented by six thousand seven hundred and fifty fully paid 1*l.* shares. The six thousand seven hundred and fifty shares were still standing in the names of the defendants as executors of Mr. Lescher.

On October 4, 1926, the solicitors to the trustees wrote to the solicitors for Mr. Lescher's executors claiming to

redeem the security. Correspondence ensued. The right to redeem was disputed and eventually this originating summons was issued on July 30, 1927. The plaintiffs asked for an account of what, if anything, was due for principal, interest, and costs under the mortgage by way of deposit of the aforesaid shares; for liberty to redeem the shares on payment to the executors of the mortgagee of what might be found due; for an account of the dividends received in respect of the shares by the mortgagee and his executors; and for payment to the plaintiffs of any balance found due on taking such account.

The summons came on for hearing before Russell J. on March 14, 1928.

Jenkins K.C. and *B. A. Hall* for the plaintiffs. There is no Statute of Limitations that applies to a charge on personal property and there is no obligation on a Court of equity to follow the analogy of a statute which applies to real estate: *Mellersh* v. *Brown* (1); *Charter* v. *Watson.* (2) The right to redeem such a charge is not barred by delay unless because of it a change in the position of the parties has been effected: *Archbold* v. *Scully.* (3) The plaintiffs are entitled to have the shares transferred to them, and to have an account of the dividends received since 1921, and an order for payment on terms to be settled by the Court: *Knebell* v. *White.* (4)

Spens K.C. and *F. R. Evershed* for the defendants. In mortgages of personal property the equity of redemption may be asserted by the mortgagor if he brings his bill to redeem within a reasonable time: Story's Equity Jurisprudence, 13th ed., vol. ii., p. 335, § 1031. Where a mortgagee is in possession time begins to run from the last acknowledgment by the mortgagee of the mortgagor's title and a Court of equity, in imitation of the law applicable in the case of lands, will not allow redemption of a mortgage after the mortgagee has been twenty years in possession: *Hovenden* v. *Lord Annesley.* (5)

(1) 45 Ch. D. 225, 229.
(2) [1899] 1 Ch. 175.
(3) (1861) 9 H. L. C. 360, 371.
(4) (1836) 2 Y. & C. Ex. 15, 22.
(5) (1806) 2 Sch. & Lef. 607, 637.

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Here the last acknowledgment by the mortgagee was in 1908. *Rule* v. *Jewell* (1) and *In re Lady Hastings* (2) were also cases where claims were held barred by analogy to the Statute of Limitations. Although dealing with a mortgage of land the language used in *Hovenden* v. *Lord Annesley* (3) is quite general, and twenty years is taken as the extreme period within which an equitable claim must be brought. The limit then, twenty years, now only survives in the case of specialty debts. Here the delay has been such as to make it inequitable to enforce the claim. In *Floyer* v. *Lavington* (4); *Lockwood* v. *Ewer* (5); and *Brooks* v. *Muckleston* (6) equitable relief was refused by the Court on account of delay. The plaintiffs' claim is also barred by their "laches." The doctrine of laches is confined to equitable claims which are subject to no statutory bar either expressly or by analogy. "Laches" denotes that there has been such delay as either by itself, or in the circumstances, makes it inequitable to enforce the claim. The last occasion when Mr. Lescher admitted he was a mortgagee was in 1908. From 1908 to 1915 no dividends were paid on the ordinary shares. In 1915 the plaintiffs knew that the company was recovering and paying off the arrears on the preference shares. It was not until 1926 that a claim to redeem was made.

In all equitable claims, except breach of trust, time itself, if unduly prolonged, is as much a bar as an express statutory provision. "No equitable claim is likely to be entertained if the party entitled delays to put it in suit for twenty years after he has been in a position to do so. The claim is then 'stale' and is unenforceable"; Lightwood's Time Limit On Actions, p. 256; *Lindsay Petroleum Co.* v. *Hurd* (7); *Erlanger* v. *New Sombrero Phosphate Co.* (8); *Blake* v. *Gale* (9); *Allcard* v. *Skinner.* (10)

The surplus of dividends over the loan is not recoverable on a summons: Order LV., r. 5A.

(1) (1881) 18 Ch. D. 660.
(2) (1887) 35 Ch. D. 94.
(3) 2 Sch. & Lef. 607, 637.
(4) (1714) 1 P. Wms. 268.
(5) (1742) 9 Mod. 275; 2 Atk. 303.
(6) [1909] 2 Ch. 519.
(7) (1874) L. R. 5 P. C. 221, 239.
(8) (1878) 3 App. Cas. 1218, 1279.
(9) (1886) 32 Ch. D. 571.
(10) (1887) 36 Ch. D. 145.

Jenkins K.C. and *B. A. Hall* in reply. Length of time was only one of the elements considered in refusing redemption in *Floyer* v. *Lavington* (1) and *Lockwood* v. *Ewer*. (2) In *Brooks* v. *Muckleston* (3) a foreclosure action was dismissed on the ground of delay, the judge saying that it would be hard to imagine a more stale demand. That cannot be said of this case. It was not until 1921 that the dividends received by the mortgagee were sufficient to pay off the loan with interest. Until 1921 Mr. Lescher held the shares as mortgagee, and in 1926 the plaintiffs claimed the right to redeem.

April 2. RUSSELL J. [stated the facts and continued:] Mr. Lescher's position as regards the loan was this. He had no personal remedy for the principal and interest, for his mortgagor was dead and the executors had no estate. He could only hope for recoupment either by realizing the shares as mortgagee, or by foreclosing and holding the shares as an investment, or realizing them as absolute owner. Foreclosure could be dispensed with by obtaining a release of the equity of redemption, but he neither sold nor foreclosed, nor did he obtain a release of the equity of redemption. The only possible inference is that he determined to hold on to his security with a view to realizing later to greater advantage. He elected to stand on his security.

The following facts are clear upon the evidence: (1.) The plaintiffs are assignees of the equity of redemption in the shares; (2.) the mortgagee received in his lifetime by means of dividends moneys far more than sufficient to repay him the 1000*l.* principal with interest at the agreed rate from the date of the loan; (3.) the mortgaged shares with the bonus additions are there, available for return to the assignees of the equity of redemption if the debt for which they stood in Mr. Lescher's name as security has been repaid; and (4.) no rights of any third person affecting the shares has intervened, for those claiming under Mr. Lescher's will are mere volunteers. In those circumstances the plaintiffs are, in my opinion, prima facie entitled to redeem.

(1) 1 P. Wms. 268. (2) 9 Mod. 275; 2 Atk. 303.
(3) [1909] 2 Ch. 519.

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On what grounds is this claim resisted? The evidence of the defendants contains suggestions of foreclosure by Mr. Lescher, or alternatively of a bargain by which in some way Mr. Lescher is supposed to have acquired the shares freed from any right to redeem. There is no justification for either suggestion, nor does any Statute of Limitations apply to bar the right to redemption. Ultimately the defendants were driven to rely solely on delay and laches and their contention was that this Court, in view of delay by the plaintiffs, would refuse to grant to the plaintiffs the equitable relief which they sought.

This question of delay requires some careful examination in order to see exactly at what point of time the delay is said to begin. Mr. Lescher undoubtedly held as mortgagee when he wrote his letter in June, 1908. The plaintiffs were under no contractual liability to him to pay either interest or principal, nor was there, so far as I can see, any duty on them to inquire from time to time whether he still held the shares or not, or if he held them whether he held them as mortgagee. It was open to him to sell after notice or to foreclose. He did neither, and the plaintiffs were entitled, and indeed bound, to assume that he continued to hold the shares as mortgagee. Until the time arrived when the loan had or might have been paid off out of the dividends received by the mortgagee, the plaintiffs were in no way bound to assert their right to redeem or their right to have the shares re-transferred to them. From the evidence we now know that this event did not in fact occur until some time in the middle of the year 1921. Eighteen months later the letter of January 5, 1923, is written, and in October, 1926, the claim to redeem is quite definitely made and insisted upon.

The letter of January 5, 1923, was much commented upon as suggesting that the writer was conscious that he could make no claim but was inviting Mr. Lescher to confer a favour by transferring the shares. The letter is of a debatable character. It certainly treats the debts as still due if not paid off out of the dividends. This would be inconsistent with the view that the relation

of mortgagor and mortgagee no longer existed. The letter, in my opinion, is the letter of a man who is not certain of the exact position, but who is asserting that the relation of mortgagor and mortgagee exists. Putting it at its lowest, he is not admitting that the relation has ceased to exist. In my view no greater delay can be attributed to the plaintiffs than the period of five years which elapsed between the middle of 1921 and October, 1926. If I am right in this view there is no foundation for the suggestion that delay or laches can be any answer to the present claim.

It was argued, however, by the defendants that the period of delay must for some reason be dated back to June 18, 1908, that is, some eighteen years before the claim against the executors, and some nineteen years before the issue of the originating summons herein. Upon this footing it is said that the delay is so great that this Court ought to and will refuse to grant equitable relief, and in arriving at that conclusion will be assisted, if not guided, by a consideration of the Statute of Limitations. Why delay should commence to run in June, 1908, I confess I cannot imagine, but the case was argued on that footing. Instances were cited of cases in which equitable relief was refused after lengthy delay on the part of the person seeking it. I do not propose dealing with those cases which are unconnected with mortgages. Three cases as to relief in respect of mortgages were cited, but no one of them appears to be of assistance to me here. In *Floyer* v. *Lavington* (1) a bill was brought for the redemption of a rent-charge expressed to be redeemable in the grantor's lifetime. The rent-charge had been granted some sixty years before. In the meanwhile the grantee had, after the death of the grantor, conveyed to a purchaser who had settled it on his marriage. Redemption was sought by the heir of the grantor. The Lord Chancellor dismissed the bill on various grounds, which included delay. The reporter adds that "It was thought that the length of time was the chief objection." It is, however, obvious that in addition

(1) 1 P. Wms. 268, 272.

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to lapse of time the position had altered and other rights had intervened.

Lockwood v. *Ewer* (1) was a case in which, after twenty-one years, the representatives of a mortgagor claimed redemption against the representatives of a mortgagee. The subject-matter of the mortgage, made in 1708, was stock in the old East India Company. The facts are not very lucidly stated in the report, but this much appears, that the mortgagee had had to expend moneys on calls, that the old and new East India Companies had been united, and that before his death in 1715 the mortgagee had sold out the mortgaged stock. The Lord Chancellor's judgment is in the main directed to showing that the mortgagee could sell the stock without the necessity of foreclosing. He then dismissed the bill, the delay in that case being fatal. In that case, too, it is obvious that during the period of delay changes had occurred, and indeed the stock seems to have been sold.

Brooks v. *Muckleston* (2) was an instance of the dismissal of a foreclosure action on the ground of delay. The delay was grievous, and in the meanwhile the defendant, though having notice of the mortgage, had paid value for the mortgaged property upon the faith of the fact that no interest had been paid or claimed for forty-five years. The case is quite unlike the present one and in any event different considerations should, it seems to me, apply to applications by mortgagors to redeem to those which apply to applications by mortgagees to foreclose. Even if the delay to be imputed to the plaintiffs extends beyond the five years which I have indicated to some point of time subsequent to June, 1908, none of the cases cited would, in my opinion, justify me in declining to order redemption in the present case. There can be no doubt on the evidence that when the account is taken nothing will be found due in respect of principal, interest, or costs. The shares are available and no one has altered his position in the meantime. Equity should not, in my opinion, deprive mortgagors of their right to redeem if when they assert it the debt has been or can be repaid,

(1) 9 Mod. 275; 2 Atk. 303. (2) [1909] 2 Ch. 519.

the security is available, and no one's position has been altered in the meanwhile. If these circumstances co-exist the mortgagor should be allowed to redeem unless his right has been destroyed by statute, foreclosure, sale or release.

There is no difficulty in the present case as to ordering a re-assignment of the six thousand seven hundred and fifty shares. The plaintiffs, however, ask in addition for an account of the dividends received by Mr. Lescher and his executors and payment of the balance after deducting the amount of principal, interest, and costs in respect of the loan. This is asking for a personal order for payment against the mortgagee. Such relief they are not, in my opinion, entitled to obtain by means of an originating summons. The relief obtainable under Order LV., r. 5A, is confined to the relief there specified and does not extend to personal orders for payment. If the plaintiffs desire to recover from the defendants any moneys received over and above the amount of principal, interest, and costs they can only do so in proceedings commenced by writ, to which of course the relevant Statute of Limitations would apply. The plaintiffs concede that the defendants are entitled to their costs of the present proceedings. These must be taxed as mortgagee's costs. I will order an account to be taken of what, if anything, is due to the defendants as executors of Mr. Lescher for principal, interest, and costs, including therein their costs of this action in respect of the loan of 1000*l.* with interest at 6 per cent. advanced by Mr. Lescher to Henry Weld-Blundell in February, 1900. I further order that upon payment by the plaintiffs to the defendants of the amount, if any, found due or, if nothing is found due, upon the filing of the certificate finding that nothing is due, the defendants do transfer the six thousand seven hundred and fifty shares standing in their names to the plaintiffs or as they shall direct. And I direct that in taking the account interest is to be calculated only from November 5, 1905, credit is to be given for all cash received since that date by Mr. Lescher, or the defendants, by way of dividend or bonus in respect of the shares from time to time standing in the name of

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Mr. Lescher, or themselves, as security for the said loan of 1000*l.* That is the strict order. I would, however, suggest that, without in any way prejudicing the defendants' right to appeal, an order should be made in the following form: The defendants admitting that the cash dividends received by Mr. Lescher in his lifetime or by the defendants after his death in respect of the six hundred Cornbrook shares and the three thousand shares into which they were sub-divided, and the fifteen hundred and two thousand two hundred and fifty bonus shares exceed the amount which on taking an account would be found due for principal, interest, and costs in respect of the loan of 1000*l.* with interest at 6 per cent. per annum made by Mr. Lescher to Henry Weld-Blundell in February, 1900, Order the defendants to execute a transfer to the plaintiffs or as they shall direct of the said three thousand, fifteen hundred, and two thousand two hundred and fifty shares and to deliver to the plaintiffs such executed transfer together with the certificate or certificates relating to the said shares.

[By consent the order was made in the latter form.]

J. B. B. M.

C. A.

The defendants appealed from the order of Russell J. so far as it directed the defendants as executors of Mr. Lescher to transfer to the plaintiffs, or as they should direct, the six thousand seven hundred and fifty ordinary shares in the Cornbrook Brewery Co., Ld.

The plaintiffs cross-appealed from the same order and asked that it should be varied so far as it omitted to direct an account of the dividends and profits received by Mr. Lescher and the defendants as his executors in respect of the shares subject to the mortgage or charge of February 5, 1900, and the two further deposits of August 5, 1902, and October, 1903, and payment to the plaintiffs of any balance that might be found due on the taking of such account, and that it might be ordered that an account might be taken of the dividends and profits received by Mr. Lescher and the defendants as such executors in respect of the said

shares subject to the said mortgage or charge and further deposits, and that the defendants should pay to the plaintiffs any balance that might be due to them on taking such account.

The appeal and cross-appeal were heard on June 29; July 2 and 3, 1928.

Spens K.C. and *F. R. Evershed* for the appellants.

Jenkins K.C. and *B. A. Hall* for the respondents.

The arguments on the main appeal were substantially the same as those used in the Court below. In addition to the authorities then cited the following were referred to: *Smith* v. *Clay* (1); *Aggas* v. *Pickerell* (2); *London and Midland Bank* v. *Mitchell* (3); *Firth* v. *Slingsby* (4); *Harrold* v. *Plenty* (5); *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (6); *Matthison* v. *Clarke* (7); *Anon.* (8); Fisher's Law of Mortgage, 6th ed., p. 717, § 1398; Robbins' Law of Mortgages (1897), p. 740; Coote on Mortgages, 9th ed., vol. i., p. 766.

Jenkins K.C. and *B. A. Hall* then proceeded to open the plaintiffs' cross-appeal for an account.

[LORD HANWORTH M.R. We are in your favour on that point. We think an order for an account ought to have been made.]

Spens K.C. and *F. R. Evershed* for the respondents on the plaintiffs' cross-appeal. This is a claim on the basis that the mortgagee at some time became a constructive trustee of the dividends in question. What the plaintiffs have to do in order to obtain repayment is to show that Lescher became a constructive trustee of the surplus dividends and to come to the Court within six years after the date on which that trust arose: *Banner* v. *Berridge*. (9) There are here two distinct claims (1.) to recover the property mortgaged, and (2.) to recover payment of the surplus dividends from the mortgagee on the basis that he was a constructive trustee of them. We

(1) (1767) 3 Bro. C. C. 640*n*.
(2) (1745) 3 Atk. 225.
(3) [1899] 2 Ch. 161.
(4) (1888) 58 L. T. 481.
(5) [1901] 2 Ch. 314.
(6) [1924] 2 Ch. 451.
(7) (1854) 3 Drew. 3.
(8) (1746) 3 Atk. 313.
(9) (1881) 18 Ch. D. 254.

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do not contend that there ought not to be an account, but we submit on the authority of the statement of Kay J. in *Banner* v. *Berridge* (1), that as the six years have expired since the last acknowledgment by the mortgagee, there ought to be no personal order for payment. The claim to be repaid the surplus dividends is essentially different from the claim to recover back the property. The Statutes of Limitation are applicable to the former. The claim to the surplus dividends opens up new lines of defence which are not applicable in the case of an action for redemption. We have no objection to an account being taken, but we object to a personal order for payment being made without the facts as to the surplus dividends being gone into.

[LORD HANWORTH M.R. In taking the account the ordinary rules of appropriation will apply.]

We desire to have an opportunity of raising the question of the Statute of Limitations.

[LORD HANWORTH M.R. You will have an opportunity on taking the account of raising any defence to any item.]

It is well established that the six years period applies to the case of constructive trustees.

Jenkins K.C. in reply stated that he admitted that the defendants were entitled to raise any defences they had on taking the account, and that he was content to take the strict order.

Cur. adv. vult.

July 16. The following written judgments were delivered.

LORD HANWORTH M.R. It is quite unnecessary to restate the facts, which are fully and accurately set out in Russell J.'s judgment. I agree with his summary of the facts arising upon the evidence in his judgment, and upon those facts that the plaintiffs are prima facie entitled to the order for redemption that they seek.

I agree also that there was no bargain by which Mr. Lescher could be supposed to have acquired or held the shares freed from any right to redeem them. Nor was any foreclosure

(1) 18 Ch. D. 269.

carried out by Mr. Lescher. It appears to me that his attitude, as expressed in his letter of June 18, 1908, shows that he recognized that he was a mortgagee, and that he refrained from taking the course which he appreciated was an unpleasant one, and left the matter to drift as it was—a loan the repayment of which was remote, secured by a mortgage of shares which were of small, if any, value.

So the matter rested at any rate up to 1916, for there was no change in the relevant facts. It was not until the dividends were declared and received by Mr. Lescher that this dormant transaction was quickened into life by a part payment of the arrears of interest which had continued to accrue. The country was then in the throes of the great war, and I see no reason to suppose that immediate activity or assertion of their rights by the parties on either side was to be expected or called for.

There is no Statute of Limitations which applies to bar the right of redemption, and the appellants rely upon delay and laches for such a time as ought to lead the Court to refuse the relief asked for, on the ground that the Court will take the standard of the Statute of Limitations as the measure to be approximately applied, and that, as there was no recognition by Mr. Lescher of his position as a mortgagee later, at any rate, than June, 1908, a twelve years period and more had elapsed before this summons was issued on July 30, 1927.

It is said that the Real Property Limitation Act, 1874, provides such a limit or standard of twelve years. Lindley L.J. in *Jay* v. *Johnstone* (1) says that the key to that Act is to be found in the preamble and in s. 9. The preamble says: "Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon." Sect. 7 applies the twelve years limit to actions and suits by a mortgagor in cases where the mortgagee has obtained possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, and by s. 8 applies the same limit to actions

(1) [1893] 1 Q. B. 189, 191.

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"to recover any sum of money secured by any mortgage . . . . or otherwise charged upon or payable out of any land or rent." Neither of these sections refers to mortgages of personalty.

Then by s. 9 the sections of the Real Property Limitation Act, 1833, except those specifically mentioned, are retained "in full force, and shall be construed together with this Act." The excepted sections are s. 2, which refers to making an entry upon or to recover land, s. 5, to a reversioner's right to recover land, s. 16, which provides in respect of actions to recover land, an allowance of time to persons under a disability with a total limit of the allowance, under s. 17, of forty years; s. 23, which imposes a limit of twenty years where there is possession of land under an assurance of a tenant in tail which does not bar the remainders; ss. 28 and 40, which are the sections replaced by ss. 7 and 8 of the Act of 1874.

It thus appears that, except in the case of land and charges upon it, no alteration is made, bringing the limits down from twenty to twelve years, and that the other limits remain in full force.

In my judgment there is no ground whatever for the application of the twelve years rule to proceedings for the redemption of a mortgage of personalty. Such an attempt at a so-called analogy was rejected by Kay J. in *Mellersh* v. *Brown* (1), and in *In re Powers* (2) the Court of Appeal decided that a bond, for a sum of money which if paid by the surety would have entitled him to the benefit of the mortgage of land on which the sum was lent to the mortgagor at the request of the surety, was not secured upon land and was not affected by the twelve years limit. The distinction between claims relating to land and to personalty are in my judgment clearly and explicitly retained and there is no basis for applying a twelve years limit in the present case.

I have had the advantage of reading the judgments which will be delivered by Lawrence and Sankey L.JJ., and in view of the exhaustive examination of the cases cited to us,

(1) 45 Ch. D. 225. (2) 30 Ch. D. 291.

and others, it appears to me to be quite unnecessary to go over the same ground. I agree with them in relation both as to the appeal and cross-appeal, and with the order proposed by Lawrence L.J.

LAWRENCE L.J. The main question on this appeal is whether the plaintiffs have lost their right to redeem the shares in question.

It is admitted that there is no Statute of Limitations which applies to the case, and consequently that there is no statutory bar to the plaintiffs' claim for redemption.

The appellants however contended that the Court ought to act upon the analogy of the Statute of Limitations relating to land and consequently ought to hold that the plaintiffs' claim for redemption was barred after a lapse of twelve years from the date of the last acknowledgment by the mortgagee in the month of June, 1908.

The proposition that the Court in the case of a mortgage of property other than land ought to act upon the analogy of the Statute of Limitations relating to land was emphatically negatived by Kay J. upwards of thirty-seven years ago in *Mellersh* v. *Brown* (1), which, so far as I know, has never been questioned. The learned judge in the course of his judgment states as follows: "If the Legislature has enacted that there shall be that limit with regard to real estate, and has not so enacted with regard to personal estate, on what ground am I to follow that analogy? It is not an analogy between the arrears of interest recoverable on a legal debt and those recoverable on an equitable debt. No doubt equity, in the case of an equitable debt, follows the simple analogy afforded to it by the law applicable to a legal debt; but I never heard that a Court of equity is under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law; but the reasoning is, that whereas the Legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall

(1) 45 Ch. D. 225, 229.

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be recoverable against the estate, and whereas it has not enacted anything of the kind with regard to personal estate: therefore—what? I should have thought the result was inevitable, that as to personal estate the rule is not to be observed, and the idea of there being any analogy is one which I do not understand." The cases of *London and Midland Bank* v. *Mitchell* (1) and *In re Stucley* (2) furnish further examples of the Court's refusal to apply the analogy of limitations relating to land to mortgages or property other than land. Although the cases to which I have referred were cases in which a mortgagee was claiming foreclosure yet the principle on which they were decided in my opinion applies equally to a case such as the present, where a mortgagor or his assignee is claiming redemption, with the result that the old decisions in which the Courts of equity before the Real Property Limitation Act, 1833, have, either by analogy or in obedience to a statute barring the remedy at law, adopted the same period as a bar to equitable relief (the reasons for which adoption are clearly stated by Lord Redesdale in *Hovenden* v. *Lord Annesley* (3)) have no application to the present case. On these grounds I am of opinion that the contention of the appellants that the Court ought in this case to act on the analogy of the Real Property Limitation Act, 1874, is not well founded.

Further it is clear that as the mortgagee has acknowledged the plaintiffs' right of redemption at a date less than twenty years before the commencement of this action the appellants cannot successfully maintain that the Court ought to presume a release by the plaintiffs of the equity of redemption.

In the absence of any statutory bar or of any presumption of a release the question in the present case resolves itself into whether the Court ought to refuse relief on the ground of acquiescence or laches.

The difference between acquiescence and laches was clearly pointed out by the House of Lords in *Archbold* v. *Scully*. (4) I need only quote the following passage from the speech of

(1) [1899] 2 Ch. 161.
(2) [1906] 1 Ch. 67.
(3) 2 Sch. & Lef. 607, 630–632.
(4) 9 H. L. C. 360.

Lord Wensleydale (1): "Where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar."

In the present case the appellants have adduced no evidence whatever tending to show that either the mortgagee during his lifetime, or the appellants since his death, has, or have, altered his, or their, condition on the faith of the plaintiffs' inaction. Had it been proved that any such alteration had taken place I am of opinion that a much shorter period of delay than the one in question here would have constituted a sufficient ground for refusing relief. In the absence of any such proof it is plain that the appellants cannot rely upon acquiescence as a defence to the plaintiffs' claim, and I did not understand Mr. Spens seriously to contend that they could. In the result the only ground upon which the appellants can found their argument against relief is delay or laches, which for present purposes I treat as synonymous terms.

The principle applicable to a case where long delay is set up as a defence to equitable relief is stated in the following well known passage in the judgment of the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (2): "Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party

(1) 9 H. L. C. 383. (2) L. R. 5 P. C. 221, 239.

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in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In *Erlanger* v. *New Sombrero Phosphate Co.* (1) Lord Blackburn, after quoting the above passage, says: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

In *In re Sharpe* (2) Lindley L.J. stated that staleness of demand as distinguished from the Statute of Limitations and analogy to it as furnishing a defence in equity to an equitable claim was settled at least as early as *Smith* v. *Clay* (3), and after referring to *Lindsay Petroleum Co.* v. *Hurd* (4) and *Erlanger* v. *New Sombrero Phosphate Co.* (1) said: "A defence based on staleness of demand renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief." The learned Lord Justice in holding that the delay in that case was no bar laid stress on the fact that the appellants there

(1) 3 App. Cas. 1218, 1279.
(2) [1892] 1 Ch. 154, 168.
(3) (1767) Amb. 645.
(4) L. R. 5 P. C. 221.

had lost no evidence nor any remedy and on the fact that they had adduced no evidence to prove that their testator has been induced by the plaintiffs' delay to alter his position for the worse.

The real difficulty lies in applying the principle enunciated in these cases to the facts of the present case.

In the first place I think that counsel for the appellants were right in their contention that the delay ought in the circumstances to be considered as having commenced in June, 1908, and as having continued until the month of October, 1926, when the plaintiffs definitely asserted their present claim, that is to say, for a period of eighteen years and four months. During this period the plaintiffs made no payments of principal or interest in respect of the mortgage debt nor did they in any way assert their right to redeem. After June, 1908, neither the mortgagee nor the appellants did anything which amounted to a recognition of the plaintiffs' right to redeem. In these circumstances the fact that the dividends which were received by the mortgagee did not amount to a sufficient sum to pay off the mortgage until the year 1921 does not in my opinion operate to cut out from the period of delay the years which elapsed prior to that date. The fact that a mortgagee is in receipt of the income of the mortgaged property (be such income large or small) and that in case of redemption he is bound to give credit for such income against the amount owing on his security, does not in my opinion prevent time running against an owner of the equity of redemption who neither pays any principal or interest in respect of the mortgage debt nor asserts his right to redeem. Nor do I think that the fact that the plaintiffs were under no personal liability to the mortgagee prevents time from running against them as owners of the equity of redemption. If the mortgage in the present case had been a mortgage of land I am clearly of opinion that the plaintiffs' claim to redeem would, under the Real Property Limitation Act, 1874, have been barred in June, 1920.

It cannot be denied that a mortgagor who sleeps on his rights for such a long interval of time as has occurred here

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runs a very serious risk of finding when he at last awakes and bestirs himself that the mortgagee has in the meantime altered his position on the faith of the delay and that his right to relief has been lost. But I know of no case where mere delay of less than twenty years has of itself been held sufficient ground for refusing relief to a mortgagor of personal estate claiming to redeem the mortgage.

Counsel for the appellants in support of their argument on this point relied upon the cases of *Floyer* v. *Lavington* (1) and *Lockwood* v. *Ewer*. (2) These cases, however, do not in my opinion assist the appellants' contention. In both the cases the period of delay was more than twenty years; moreover in both there were special circumstances which pointed to there having been acquiescence and not merely de ay. In the former (where the delay was apparently sixty years) the mortgage debt was to be repaid by half-yearly instalments and the mortgagee had sold the rent-charge, the subject-matter of his security, to a purchaser who had settled it. In the latter (where the delay was more than twenty years) the mortgagee had been compelled to pay calls on the stock, the subject-matter of his security, and further had sold out the stock and "united it to his own gross stock," whatever this may mean. In *Brooks* v. *Muckleston* (3), another case cited to us, the delay was forty-eight years. Counsel for the appellants also relied upon the following observations of Lord Redesdale in *Hovenden* v. *Lord Annesley* (4): "I think the rule has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within 20 years. Thus, in the case of redemption of a mortgage; if the mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not within 20 years, it is like a case at law of a promise of payment beyond the six years, and non assumpsit infra sex annos pleaded:

(1) 1 P. Wms. 268.
(2) 2 Atk. 303; 9 Mod. 275.
(3) [1909] 2 Ch. 519.
(4) 2 Sch. & Lef. 607, 636.

and so in every case of equitable title, (not being the case of a trustee, whose possession is consistent with the title of the claimant) it must be pursued within 20 years after the title accrues. This was so considered by Lord Camden, in *Smith* v. *Clay* (1), referring to *Jenner* v. *Tracy* (2): that the same length of time should bar a redemption that would bar any other equity." This passage does not help the plaintiffs, as the period there referred to is twenty years. Further, I am clearly of opinion that there is no rigid rule that every equity must be acted upon at the utmost within twenty years and if not so acted upon will be barred. Every case must obviously depend upon its own circumstances and Mr. Spens freely admitted that he could not support any such hard and fast rule. Moreover, both Lord Redesdale in *Hovenden* v. *Lord Annesley* (3) and Lord Camden in *Smith* v. *Clay* (1), when referring to the right of redemption being barred after twenty years, evidently had in mind a mortgage of land.

In my opinion, therefore, the delay which has taken place in the present case is not of itself sufficient to disentitle the plaintiffs to relief.

The next matter to be considered is whether anything has taken place during the interval which would render it "practically unjust to give the plaintiffs their remedy." The only facts relied upon by the appellants in support of their contention on this point are first that the shares became valuable and that by the month of July, 1921, the mortgagee had received dividends sufficient to pay off the total amount due to him under his mortgage, and, secondly, that the mortgagee died in the month of January, 1923, and it is alleged (although there is no evidence on this point) that estate duty has been paid on the shares on the faith that they formed part of the mortgagee's estate.

The facts so relied upon do not, in my opinion, render it inequitable to grant the relief claimed by the plaintiffs, nor, so far as I can see, is there any obstacle in the way of granting

(1) Amb. 645. (2) (1731) 3 P. Wms. 287, note (B).
(3) 2 Sch. & Lef. 607, 636.

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such relief. Nobody has been prejudiced by the delay. The mortgagee retained the shares up to the time of his death and they are now in the hands of the appellants as his executors, who have refrained from distributing them as part of the mortgagee's estate pending the decision of the Court in the present case. There is no difficulty in accounting for the dividends received by the mortgagee and by the appellants. There has been no expenditure in connection with the shares and the appellants have not lost any evidence or remedy. Moreover, the mortgagee had notice that the plaintiffs were trustees of the equity of redemption, and therefore must be taken to have known that they could not properly abandon their equity of redemption; whilst the plaintiffs may have placed some reliance upon the fact that the mortgagee could not properly sell the shares without first giving them a reasonable notice and could not foreclose without making them parties to the proceedings and giving them an opportunity to redeem. The fact that the plaintiffs were acquainted with the affairs of the company and ought to have known that the mortgage debt had been paid off in 1921 does not, in my opinion, in the circumstances, afford any ground for refusing relief, though it would, in my opinion, have been conclusive against the plaintiffs if the appellants could have proved that the mortgagee had altered his position for the worse on the footing of such payment off and in the belief that the plaintiffs had abandoned their right to redeem. If it be the fact that the appellants have included the shares in their residuary account and have paid estate duty on them, such fact does not in my opinion in the circumstances constitute a sufficient ground for refusing relief. The appellants have placed so little reliance upon this fact that they have not even mentioned it in their evidence. They no doubt relied on being able to obtain a return of the duty if the Court were to hold that the plaintiffs were entitled to redeem.

On the whole I have arrived at the conclusion that nothing has happened during the interval between June, 1908, and October, 1926, long though it was, to render it inequitable

now to make a decree for redemption, and accordingly that Russell J. was right in holding that the plaintiffs were entitled to such a decree.

The learned judge has, however, declined to insert in the decree an order for payment by the defendants to the plaintiffs of the amount by which the mortgagee and his estate have been overpaid on the ground that such an order is not one which can be obtained on an originating summons. With the greatest respect for the opinion of the learned judge I cannot agree with his decision on this point.

Order LV., r. 5A, provides (inter alia) that a mortgagor may take out as of course an originating summons for redemption, reconveyance and delivery of possession by the mortgagee.

The common redemption judgment against a mortgagee in possession where it is alleged that he has been overpaid contains an order on him to pay to the mortgagor the amount, if any, which shall be certified to be due from him in excess of the amount due for principal, interest and costs. (See Seton's Judgments and Orders, 6th ed., vol. iii., p. 1926.) In my opinion there is nothing in r. 5A which prevents the Court from making such an order upon an originating summons. It is not like the case of a mortgagee endeavouring to obtain, in addition to the usual foreclosure decree, a personal judgment against the mortgagor for payment of the mortgage debt. Such a personal judgment cannot be obtained on an originating summons, because it forms no part of the common order for foreclosure and therefore does not come within Order LV., r. 5A. The order in a redemption action for payment by a mortgagee of the amount by which he has been overpaid in my opinion stands on an entirely different footing. Such an order is properly contained in a common order for redemption, because it is incidental to and consequential upon the main relief granted by such an order. An owner of the equity of redemption on redeeming is entitled to a return not only of the mortgaged property itself but also of the fruits of that property (in the shape of income or otherwise) received by the mortgagee in excess of the amount due

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on his security. To hold that the Court could not make an order for the payment of such excess on an originating summons would mean that although the Court could on such a summons grant the main relief to which the plaintiff was entitled, an action would have to be commenced by writ before it could grant the incidental relief. Moreover, after a decree for redemption there could be no defence to an order for the payment of the excess which the mortgagee could not raise in Chambers before the Master on the making of the necessary certificate of the amount due in respect of the excess.

In the result I am of opinion that the plaintiffs succeed on their cross-appeal. The insertion of the order asked for by the plaintiff involves remodelling the order made by the learned judge. The appellants have by their counsel admitted assets for the purposes of this action, and on this footing the proper order to make on this appeal is, in my judgment, as follows :— Dismiss the appeal with costs. On the plaintiffs' cross-appeal : Discharge order of Russell J. and in lieu thereof order as follows : Let the following inquiry and accounts be made and taken, that is to say, (1.) An inquiry of what shares are now subject to the mortgages or charges in the originating summons mentioned. (2.) An account of what is due to the defendants under and by virtue of the said mortgages or charges and for their costs of this action, such costs to be taxed. (3.) An account of the dividends on the shares for the time being subject to the said mortgages or charges received by Joseph Francis Lescher deceased and by the defendants the executors of his will since his decease or any of them or by any other person or persons by the order or for the use of the said J. F. Lescher or of the defendants or any of them or which without the wilful default of the said J. F. Lescher or of the defendants or any of them might have been so received. And let what shall appear to be due on taking account No. 3 be deducted from what shall appear to be due to the defendants on account No. 2 and the balance be certified. And let upon the plaintiffs paying to the defendants what if anything shall be certified to be due to them after

such deduction as aforesaid within, etc., the defendants transfer the shares now subject to the said mortgages or charges to the plaintiffs or as they shall direct free and clear, etc., and deliver up, etc. But in default of the plaintiffs paying to the defendants what shall be certified to be due to them after such deduction within the time aforesaid, Let this action be dismissed out of this Court with costs to be taxed, etc., But if it shall appear on taking the said accounts that there is nothing due to the defendants, Let the defendants within twenty-one days after the Master's certificate transfer the said shares, etc., And let the defendants within the time aforesaid pay to the plaintiffs the amount if any which shall be certified to be due from the defendants in excess of the amount due to them as aforesaid (the defendants having admitted assets of the said J. F. Lescher for that purpose) such amount to be certified. Liberty to apply.

The appellants must pay the costs of the plaintiffs' cross-appeal.

SANKEY L.J. It is not necessary to recapitulate all the facts of this case. It will be sufficient to draw attention to a few of the salient ones.

The loan of 1000*l.*, the deposit of the shares and their transfer into Mr. Lescher's name were made in 1900. Mr. Lescher then became a mortgagee of personal property. Mr. Weld-Blundell died in 1901, and the last acknowledgment made by Mr. Lescher was in the letter of June 18, 1908. For some years he retained such dividends as were paid on the shares, but received no interest on the loan. During the war the shares appreciated in value, large dividends were paid and bonus shares were allotted from time to time, so that everything due to Mr. Lescher in respect of the loan and interest was paid off by June 13, 1921. Mr. Weld-Blundell's executors on January 5, 1923, wrote saying: "Would you be prepared to transfer the shares on payment of principal and interest?" Mr. Lescher died on January 7, 1923, and on July 30, 1927, Mr. Blundell's executors issued the originating summons claiming redemption and an account.

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Admittedly no Statute of Limitations applies, but the defendants contend that equity should follow the law. They say that at the beginning of the last century equity in dealing with mortgages of land followed or acted on the analogy of the statute and held that where a mortgagee of land had been in possession for twenty years equity would not readily assist the mortgagor to recover the property and that the doctrine of stale demand would bar his claim.

Then, still by analogy, the rule was applied in cases of mortgages of personalty. So far the argument proceeds on the lines referred to in Coote on Mortgages, 9th ed. (1927), vol. ii., p. 1093 : " Before the passing of the Statute for the Limitation of Actions relating to real property, there was no statutory limitation of time within which a suit in equity might have been brought for foreclosure of the equity of redemption in mortgaged land. But the stat. 21 Jac. 1, c. 16, s. 1, enacted that no entry into any lands, tenements, or hereditaments should be made but within twenty years after the right or title to the same should have accrued or descended. The Courts of equity . . . . adopted the statutory rule by way of analogy, and applied it to similar cases in equity ; and accordingly precluded a mortgagee of land from bringing a suit in equity for foreclosure more than twenty years after his cause of action at law for ejectment had arisen." By the Real Property Limitation Act, 1833, the period within which actions for the recovery of land must be brought was fixed at twenty years next after the time at which the right to bring such action should have first accrued and by the Real Property Limitation Act, 1874, the period was fixed at twelve years.

The defendants' argument then proceeded that equity should follow or act upon the analogy of this later statute and should apply the period of twelve years to mortgages of personalty, and that therefore in this case the Court should not assist the plaintiff to redeem the shares, having regard to the fact that the last acknowledgment made by the defendant that he was holding as mortgagee was as far back as 1908.

It may be remarked that there is no case in the reports which supports any such contention and no recognized text-book which gives any countenance to it. The rule begins to emerge in *Floyer* v. *Lavington* (1), decided in 1714, and apparently disclosing a very great lapse of time—namely, sixty years. Cowper L.C. conceived "The rent charge to be not redeemable, at so great a distance of time, and that this Court had hitherto gone too far in permitting redemptions."

In *Lockwood* v. *Ewer* (2), decided in 1742, Lord Hardwicke refused to decree a redemption. He said (3): "It would be of mischievous consequence if I should decree a redemption in this case, for the bill would never have been brought, if the East-India stock had not increased in value, which is merely an accident, and could not be foreseen at the time the mortgage was made." The time there was over twenty years.

In *Aggas* v. *Pickerell* (4), in 1745, a plea of limitations was allowed to a bill for redemption after a mortgagee of land had been in possession of the mortgaged premises at least thirty years, Lord Hardwicke L.C. saying: "How is it possible to give a greater allowance to length of time, than the Statute of Limitations does?"

In an *Anonymous Case* (5) Lord Hardwicke L.C. apparently was not prepossessed in favour of the plaintiff, whom he described as a prowling assignee of the equity of redemption of land, but he said: "The rule in relation to redemptions, which had been established in this Court for some time, and which was analogous to the Statute of Limitations, is a very right and proper rule." He added: "I am of opinion, that though no single circumstance, abstracted from the rest, will be sufficient to intitle the plaintiff to a decree, yet, taking them altogether, they are of weight enough to entitle the plaintiff to a decree." That I conceive to be the true rule. Taking the circumstances all together, are they of weight enough to entitle the plaintiff to a decree?

(1) 1 P. Wms. 268, 271.
(2) 2 Atk. 303; and at greater length 9 Mod. 275.
(3) 2 Atk. 303.
(4) 3 Atk. 225, 226.
(5) Ibid. 313, 314.

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In *Smith* v. *Clay* (1) it is said: "The reporter having been favoured with a more accurate note of Lord Camden's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the profession, and has therefore inserted it here." The note itself is in fact from Lord Camden's own handwriting in his note book, and states: "A Court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this Court." In that case it was held that a bill of review may be barred by delay of twenty years, but the Lord Chancellor goes on: "But as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied to similar cases in equity. For when the Legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period, that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

I do not think that this means that a Court of equity is always to adopt the period fixed by Parliament, for by the hypothesis in this particular case no period has been fixed by Parliament. The Court is governed by the circumstances of each case. See too per Lord Redesdale in *Hovenden* v.

(1) 3 Bro. C. C. 640*n*.

Lord Annesley (1), where he reviews the previous cases, and per Sir George Jessel M.R. in *Sutton* v. *Sutton*. (2)

In *Archbold* v. *Scully* (3), in 1861, Lord Campbell L.C. said: "The real question in the case seems to me to be, whether the appellant is barred by the lapse of time between 1835 and 1857, when his bill (or cause petition) was filed. If any new rights had been created in this interval, or if anyone would be prejudiced by the delay, that is, by the appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by laches or acquiescence, or whatever name may be given to his long sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays." Lord Cranworth made remarks to the same effect (4) in the case.

In *Erlanger* v. *New Sombrero Phosphate Co.* (5) a great common lawyer, Lord Blackburn, uttered a note of warning on the principles of delay, although the matter under discussion had nothing to do with that now under consideration. Quoting from *Lindsay Petroleum Co.* v. *Hurd* (6), he says (7): "In every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitation, the validity of that defence must be tried upon principles substantially equitable." "I think," he continued, "from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty."

It is not necessary to go through all the cases, because they are only illustrations of the application of the rule to

(1) 2 Sch. & Lef. 607, 636.
(2) (1882) 22 Ch. D. 511, 515.
(3) 9 H. L. C. 360, 371.
(4) 9 H. L. C. 373.
(5) 3 App. Cas. 1218.
(6) L. R. 5 P. C. 221, 240.
(7) 3 App. Cas. 1218, 1279.

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the particular facts of the case, and those cited show what facts have from time to time been taken into consideration. Two recent examples are *London and Midland Bank* v. *Mitchell* (1) and *Brooks* v. *Muckleston* (2), decisions of Stirling J. and Joyce J. respectively.

Story's Equity Jurisprudence, 13th ed., vol. ii., p. 334, § 1030, states in my view the true rule. The learned author begins by saying: "Let us now pass to a brief consideration of the doctrines of equity applicable to mortgages and pledges of personal property," and contends (§ 1031) that "in mortgages of personal property, although the prescribed condition has not been fulfilled, there exists as in mortgages of land an equity of redemption which may be asserted by the mortgagor if he brings his bill to redeem within a reasonable time." That, in my view, is the difference in principle between mortgages of land which are governed by statute and mortgages of personalty, the redemption of which depends upon equitable doctrines founded upon what is just and reasonable having regard to all the circumstances of the case. Nowhere is it suggested in the text-books that the period of twenty years should now be reduced to twelve.

In Robbins' Law of Mortgages (1897), p. 742, the law as to redemption of mortgaged personalty is stated, as in Coote, and no suggestion is made of a twelve years rule.

In Fisher's Law of Mortgage, 6th ed. (1910), p. 717, the question of the remedy in equity for redemption of pledges of goods and stock is discussed again, with no mention of a period of twelve years. The author says: "The privilege of redemption will be sparingly allowed if the action appear to have been brought on account of an accidental increase in the value of the pledge." With regard to a pledge it is suggested it may be redeemed at any time during the lifetime of the pledgor, except during outlawry. It will therefore be seen that there are no decided cases and no text-books of authority which support the contention that the Court should now adopt the twelve years rule.

(1) [1899] 2 Ch. 161. (2) [1909] 2 Ch. 519.

I doubt the wisdom of laying down a hard and fast rule in equity that any particular number of years should bar a mortgagor's right to redeem personal property; that would be to make equity governed by an Act of Parliament, and, in the words of Hobart C.J., "to bring the Statute in like a tyrant" (1), whereas Parliament has not thought fit to legislate for this particular case.

In my opinion the Court in deciding the problem must have regard to all the circumstances of the case. Unreasonable delay may bar the mortgagor's right to redeem. What is reasonable is a question of fact. No doubt length of time is a material consideration and an important fact. On the other hand, an equally important fact is the consideration whether there has been any change in the position of the mortgagee, or any one claiming under him, so as to make it neither just nor convenient nor indeed possible to restore the parties to their original condition. Again, the recognized legal exceptions contained in the statute which prevent time running must be taken into consideration. Beyond that there is the fact that for some years during the period in question a war was going on, during which some people did not insist upon or put forward their rights. In the present case the sole question in my view is whether the delay of the mortgagors in applying to redeem is such that it ought to bar their right. Here there has been no such change in the position of the parties as to make it impossible to restore them to their original position. To that position they can be remitted without difficulty, without inconvenience and without injustice to themselves or prejudice to third parties. That there has been delay must be conceded. If the period is taken, as the learned judge in the Court below took it, from the date when the debt was satisfied in 1921, it is clear that the subsequent delay is not sufficient to bar; but I do not think that the Court ought to adopt the period of twelve years contended for by the appellants, and even if the delay has to be reckoned from June, 1908, I see nothing to compel us, having regard to all the circumstances, to say that it is so long that it ought to

(1) See *Maleverer* v. *Renshaw* (1669) 1 Mod. 35, 36.

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bar the plaintiffs' claim. In my opinion the appeal should be dismissed.

Upon the cross-appeal I wish to say nothing, except that I agree with what has been said by the other members of the Court.

Appeal dismissed.
Cross-appeal allowed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Gregory, Rowcliffe & Co., for Weld & Weld, Liverpool.*

W. I. C.

C. A. 1928 CLAUSON J. *May* 2. C. A. *July* 17, 19.

TILLING-STEVENS MOTORS, LIMITED *v.* KENT COUNTY COUNCIL AND MINISTER OF TRANSPORT.

[1927. T. 856.]

Revenue — Licence Duties — Mechanically-propelled Vehicles — Electrically-propelled Vehicle—Petrol-electric Vehicle—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 13; *Sch. I., para.* 5.

A vehicle commonly known as a "petrol-electric" motor, the primary motive power of which is a four-cylinder internal combustion engine of the usual type coupled through a spring drive to an electric generator, which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear, is not an "electrically-propelled" vehicle within the meaning of para. 5 of Sch. I. to the Finance Act, 1926, but a vehicle which is "other than electrically-propelled" within the meaning of the same paragraph, and is under s. 13 of the Finance Act, 1920, as amended by s. 13 of the Act of 1926, assessable to tax accordingly.

So *held* by the Court of Appeal (Lord Hanworth M.R. and Sankey L.J.; Russell L.J. dissenting), reversing the decision of Clauson J.

WITNESS ACTION.

The plaintiffs, who carried on business as engineers and motor chassis manufacturers at Maidstone, made, amongst other vehicles, a certain "petrol-electric" vehicle in which a petrol engine and electric generator generated electricity, which was used in an electric motor to propel the rear wheels.

The defendant Council was the licensing authority, having statutory powers to levy and collect duties on licences for

mechanically-propelled vehicles, which powers were subject to regulations made by the Minister of Transport, those duties, when so levied, being payable to that Minister.

Under the First Schedule to the Finance Act, 1926, the licence duties (imposed by s. 13 of the Finance Act, 1920) in respect of electrically-propelled vehicles, constructed or adapted for the purposes therein mentioned—and it was not disputed that the plaintiffs' petrol-electric motor was so constructed or adapted—was at a lower rate than the rate of duty for a vehicle which was not electrically propelled. It was not disputed that the principle of the working of the plaintiffs' vehicle was that described in the plaintiffs' own prospectus, and was as follows: "The primary motive power is a four-cylinder internal combustion engine of the usual type. This is coupled through a spring drive to an electric generator which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear."

The plaintiffs charged the Council with having wrongfully refused to license one of their petrol-electric vehicles as an electrically-propelled vehicle at the rate of duty chargeable thereon under the Schedule to the Act, and sought a declaration that the vehicle in question and vehicles similar thereto were "electrically-propelled" vehicles within the meaning of para. 5 of the Schedule, and chargeable with the licence duty prescribed in respect of such type of vehicle. A further declaration, sought by the plaintiffs that they were entitled to repayment of certain licence duties paid by them in respect of such vehicles over and above the amounts properly chargeable under s. 13 of the Act upon electrically-propelled vehicles, was withdrawn at the trial.

The defendants delivered separate defences.

The action was heard by Clauson J. on May 2, 1928.

Sir Arthur Colefax K.C. and *Trevor Watson* for the plaintiffs. Any vehicle which derives its powers of propulsion from electricity is an "electrically-propelled" vehicle. There is no mechanical connection between the combustion engine and the rear axle. What is transmitted by the dynamo is

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electrical energy and not mechanical energy. Such a vehicle is properly described as an "electrically-propelled" vehicle, even though, differing from an electric tram in that respect, it carries with it its primary source of motive energy—namely, an internal petrol combustion engine. If one must go back to the primary source of energy, in most of the ordinary petrol motors the primary source is electricity, but nobody would describe such motors as electrically-propelled vehicles.

K. E. Shelley for the Kent County Council.

Sir Thomas Inskip A.-G. and *Stafford Crossman* for the Minister of Transport. The plaintiffs' vehicle is not propelled by electricity, because the primary source of power on the vehicle itself is not electric but is the combustion engine. True, the back axle is, in a certain sense, made to revolve by electricity, but it is essential to ascertain the primary source of motive power. What operates upon the back axle and causes the wheels to revolve is the energy generated by an ordinary combustion engine on the vehicle which was transmitted by the electrical apparatus employed.

CLAUSON J. The plaintiffs possess two vehicles, the nature of which I will describe in a moment. The Kent County Council, whose business it is to collect the duties payable in respect of those two vehicles, and the Minister of Transport, who is the authority who ultimately receives from the Kent County Council those duties, are the defendants in the present action.

Under the First Schedule of the Finance Act, 1926, the vehicles which are electrically-propelled and which are constructed or adapted for use in the particular way there described (and the plaintiffs' vehicles are so constructed and adapted without question) are taxed at a lower rate of tax than vehicles which are other than electrically-propelled vehicles. The plaintiffs maintain that the vehicles in question are electrically-propelled vehicles. The defendants maintain the view that the vehicles in question are not electrically-propelled vehicles. I have not been referred to any portion of

the Act except the section which imposes the taxation stated in the Schedule, and, accordingly, the only guide I have to the intention of the Legislature is the language which is used in the Schedule which I have shortly stated.

Now there are several types of mechanically-propelled vehicles with which the public is in these days very well acquainted. I will take from the Attorney-General's cross-examination of the one witness called for the plaintiffs, the classes with which the public are most familiar. There is, first of all, the vehicle propelled by steam. No element of electricity, as I understand it, comes for any purpose with which I am concerned into the ordinary steam-driven car, and every one agrees that the ordinary steam car is not electrically-driven. There is then the familiar motor car, or motor lorry, which is propelled by an internal combustion engine, which operates by the combustion of petrol. There, again, although it is true that electricity is in most, if not all, types of vehicle used in producing the com ustion, nobody suggests that a vehicle of that type is an electrically-propelled vehicle. Then there is what is commonly known to the public as the electric car. In the case of the electric car, as I understand it, the motion is communicated to the wheels by an electric motor which, if I may use a popular expression, is fed with electricity from a battery carried in the car. There is then another familiar type of vehicle, the tram, to the wheels of which in the same way motion is communicated by an electric motor which, if I may again use the popular, although very probably inaccurate expression, is fed with electricity by means of connection with a cable either underground or overhead. There is then this particular type of vehicle which is now in contest, which I will proceed to describe. It is described in a document or a prospectus, which was marked "P. 3," and which it is agreed on all hands contains a statement which is accurate so far as it goes of the way in which this vehicle works. I will quote a passage on p. 7 of "P. 3," but, first of all, I should say that these vehicles are known as petrol-electric vehicles: "The primary motive power with the petrol-electric is a 4-cylinder internal

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combustion engine of the usual type. This is coupled through a spring drive to an electric generator"—that is what is spoken of, and is shown on the plan to which I will refer in a moment as the dynamo—" which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear." If I may put that in rather more popular and very probably inaccurate language, it seems to me to mean this: There is an ordinary internal combustion engine operating by the combustion of petrol, which produces the electricity, which by an electric motor drives the rear wheels of the vehicle. I have before me a plan marked "D. 1" which shows under No. 1 what is described as the conventional lorry, which is the ordinary motor car or motor lorry, showing that the petrol motor communicates direct through the gear box with the propeller shaft and so communicates motion to the wheels. That is the type of vehicle which, as I have stated, every one agrees is not electrically driven. Under No. 3 of "D. 1" I have a plan of what is described as an accumulator driven vehicle. I have spoken of it as an ordinary electric car. That shows that there is a battery which communicates with or, if I may use the same metaphor that I have used before, feeds with electricity the electric motor which is in immediate connection through the propeller shaft with the back wheels of the car. Then No. 2 shows what is described as the plaintiffs' construction, the petrol-electric car. There you have a petrol motor corresponding to the petrol motor which is shown under No. 1 as part of the conventional lorry. That communicates, not through a gear box with the propeller shaft, but with the dynamo and through the dynamo with the electric motor, and the electric motor operates by reason of the electricity which, by reason of the working of the petrol motor and the dynamo, has been generated; and the electricity so fed into the electric motor, works the wheels.

Now in my view a vehicle which works in that way cannot accurately be said not to be electrically-propelled. It is perfectly true that if you go back, as the Attorney-General invited me to go back, to the earliest source of energy to be

found within the vehicle itself, I find a petrol motor; but I can find nothing in the Act which either requires or entitles me to go into a consideration of what is the earliest source of energy to be found in the vehicle. What I have is this: that, to put it popularly, the wheels go round because the electric motor with the help of the propeller shaft makes them revolve. In my view if the wheels of the vehicle go round because of the action of an electric motor in the way I have stated, then that vehicle, without the need of going into the matter scientifically, and simply as a question of the popular use of language, comes within the category of electrically-propelled vehicles, or as I put it just now, it does not seem to me possible to say of such a vehicle, that it is not electrically-propelled, although it is perfectly true historically that petrol has had something to do with the motion of the vehicle.

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On those grounds, I am of opinion that the plaintiffs have established before me that these particular vehicles with which I have to deal are electrically-propelled vehicles within the meaning of that Schedule. The result of that is that the plaintiffs are entitled to a declaration in the terms of the first paragraph of the prayer in their statement of claim, and to payment by the defendants of the costs of the action.

H. C. H.

C. A.

The defendants appealed, and gave separate notices of appeal. The appeals were heard on July 17, 1928.

Sir Thomas Inskip A.-G. and *Stafford Crossman* for the appellant, the Minister of Transport.

K. E. Shelley for the appellants, the Kent County Council.

Sir Arthur Colefax K.C. and *Trevor Watson* for the respondents.

The arguments were substantially the same as those used in the Court below.

Cur. adv. vult.

July 19. The following judgments were delivered:—

LORD HANWORTH M.R. In this case an action was brought by the Tilling-Stevens Motors, Ld., against the Kent County

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Council and the Minister of Transport to obtain a declaration that petrol-electric vehicles "and vehicles similar thereto, are electrically-propelled vehicles within the meaning of para. 5 of the First Schedule of the Finance Act, 1926, and are chargeable with license duty under s. 13 of the said Act as such, and not as vehicles other than electrically-propelled vehicles" and for repayment of sums which had been paid by the plaintiffs to the defendants on the basis that there was due from the plaintiffs the higher duty and not the lower duty, which they now claim ought to be paid by them, and no more.

Clauson J., who heard the case, gave judgment in favour of the plaintiffs on the claim and held that in these particular vehicles the wheels go round because there is an electric motor at the propeller shaft which makes them revolve, and in consequence of that it seemed to him not possible to say of such a vehicle that it is not electrically-propelled, although it is perfectly true that petrol has had something to do with the motion of the vehicle.

The appeals are brought by the Kent County Council and the Minister of Transport respectively, the defendants in the action, claiming that judgment ought to be entered for the defendants on the basis that the plaintiffs, Tilling-Stevens Motors, Ld., have been properly assessed to the tax. We have, therefore, to consider what is the proper interpretation to be placed upon the statute imposing the tax, and what is the proper designation of these vehicles which are in question.

Now it is a sound rule of law which has been applied time and again to Finance Acts that the words, if there is nothing to qualify them, must be construed in the ordinary and natural meaning of the words and sentences; and secondly, that under the Finance Act, the usual course is to look at the substance of the matter.

Before the Finance Act of 1926, under which these particular duties are charged, there was a similar division of categories which had been known in earlier Finance Acts. Without going further back for examination, I have found

that in the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), provision is made by s. 13 for an excise duty "which is chargeable at the commencement of this Act in respect of any vehicle which is chargeable with duty as a mechanically-propelled vehicle under this section" and so on, and the rates are to be such as are specified in the Second Schedule to that Act. That Second Schedule introduced two categories which are subsequently maintained—namely, "vehicles which are electrically-propelled, and which do not exceed 25 cwt. in weight unladen" and "vehicles other than such electrically-propelled vehicles as aforesaid."

Without dealing with the intervening Acts, it appears in this particular Finance Act, which is the operative one at the present time, that is, from January 1, 1927, that s. 13 of the Finance Act, 1920, is to have effect as if the rates set out in the First Schedule to the Act of 1926 had been substituted for the rates set out in the Schedule of the Act of 1920. The Schedule that is operative now is one which divides the vehicles in this way: Vehicles being vehicles which are electrically-propelled, and secondly vehicles being other than electrically-propelled.

This particular vehicle is one which is described in two little documents which have been handed up, one marked P. 1, in which it is called "The Tilling-Stevens Petrol-Electric. No Gears. No Clutch," and the merit of this system is one which relates to the transmission stresses. In P. 3, another document which was handed to us, it is said: "The Tilling-Stevens Petrol-Electric System has been designed to provide the simplicity and smooth-running qualities of the purely electric vehicle, without the great disadvantage of the battery —this system had also as its object the elimination of gear changing and consequently jerky running, the great drawback of the gear-driven vehicle. The petrol-electric vehicle, having no clutch, gear box or battery, has achieved this object."

Applying the rules which I have already stated with regard to the interpretation of the Act, that we must look at the words in their ordinary signification and at the substance

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of the matter, I think it is plain that, from the Act of 1920, followed out in the Act of 1926, the Legislature intended to provide two categories which were easily intelligible to persons possessing vehicles who had to determine under which category they fell to be taxed.

It does not appear to me to be necessary or, indeed, right, to enter into a discussion which might be very suitable in a patent case, but not germane when we have to deal with categories of vehicles which are not drawn up on a scientific basis. Those who are affected by, and who are required to act upon, the Schedule, are not necessarily equipped with scientific knowledge, but the Schedule is intended to give them a differentiation of what is the general appraisement of the propelling force. If we are to apply precise scientific knowledge, it might be said, of what is commonly known as a steam engine, that that is quite an inappropriate term, because the steam is generated by burning coal, and the coal is brought into operation by the labour of the man behind it who lights the fire and loads the fuel. Similarly, in the case of what is commonly called a motor car, it is not merely an internal combustion engine fed with petrol, but it is necessary, before the engine can be put into operation, that some means should be used either to wind it up or to compress it, and further, that electric batteries should be used to provide the spark from which the combustion is obtained. If you are to divide mechanically propelled vehicles into those which are propelled by electricity and those which are not, I think you must take some broad distinction, and not rely upon a scientific analysis of experts.

The main feature claimed for this device is that, in what might be called a motor vehicle or motor bus, it eliminates the gear box and the clutch and the consequent shocks incidental to their use. It provides a simpler method of running in what is a petrol-driven vehicle. As its name shows, it is a petrol-electric car. There is electric transmission from the motor engine in what was, and what remains, the vehicle known as a motor bus. There is no doubt that the petrol engine causes electricity to be stored in the

accumulator, and the release of the electricity provides the mechanical power to drive the wheels. You must store petrol to begin with ; without it electric power is not produced, and no exterior electricity can be made use of. The storage of electricity may enable you to run the car after the petrol is exhausted, but in order to restore the power of the engine, the driver must replenish his petrol and not recharge the accumulators.

The question therefore arises : What is the general, apart from the scientific, explanation of the motor of this vehicle ? Would it be called an electric vehicle such as is accepted as being an electric vehicle—namely, the electric brougham ? It is true that Sir Arthur Colefax seemed, upon justifiable grounds, to cast doubt upon whether or not the electric brougham is electrically propelled, because its power from which the wheels are driven is that which is contained in the accumulators, and they emit their power by chemical action. I think, myself, however, that we must discard scientific accuracy, and go back to what was, in 1920, and what remains in 1926, a table of vehicles which can be understood and can be interpreted on broad grounds—not perhaps with scientific accuracy, but on broad grounds—and which provides a division intelligible to ordinary persons between those vehicles which are electrically-propelled and those vehicles which are not electrically-propelled.

I find myself unable to agree with the judgment of Clauson J. I think he puts too narrow a construction upon the statute when he says : " I find a petrol motor ; but I can find nothing in the Act which either requires or entitles me to go into a consideration of what is the earliest source of energy to be found in the vehicle." It appears to me that he is entering upon an inquiry which is too precise, and that the interpretation of this Act is to be found by applying the broad rules under which these vehicles are known, and the interpretation of which I think would be simple to those who are engaged in the common use of them. It appears to me that this vehicle, although it has got an electrical transmission of power, still remains one which is other than an electrically-

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propelled vehicle, and is not brought within the other division contained in the Schedule—namely, one which is electrically-propelled.

For these reasons, I am of opinion that this vehicle falls into the second category, and does not fall to be taxed under the earlier part of para. 5 of this Schedule of the Finance Act.

On these grounds it appears to me that the action was one which ought not to have succeeded, and that the imposition of the tax was correct. Consequently the appeal must be allowed with costs, and judgment entered in the action for the defendants with costs.

SANKEY L.J. I agree with my Lord's judgment.

The problem before the Court is a very short one, but one which is not free from difficulties. We have to decide whether this vehicle under consideration, the Tilling-Stevens motor car, was a vehicle which was electrically-propelled. If it was a vehicle which was electrically-propelled it paid rather less tax than a vehicle which was other than electrically-propelled.

First of all, with regard to the canon of construction for taxing Acts, I think that has been laid down with great clarity in two cases by Lord Halsbury L.C. In *Lord Advocate* v. *Fleming* (1) he said in dealing with such Acts: "We have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted." In *Tennant* v. *Smith* (2), an earlier case, he said: "In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects

(1) [1897] A. C. 145, 152. (2) [1892] A. C. 150, 154.

the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

In this case do the words of the Act reach the alleged subject of taxation? That is where the difficulty begins, because the word "propelled" is a word which is susceptible of different shades of meaning. In the Oxford Dictionary a number of examples are given. There is an example as far back as 1762, where the words were: "Propell'd by flattering gales, the vessel glides." Another one, in a patent specification of 1790, I think, is: "To cause the vibrating water . . . . to propell the vessel." Another one is in the well known Treatise by Buchanan, the title of which is "Treatise on Propelling Vessels by Steam."

What is the meaning of the words "electrically-propelled" in this case? We have had a diagram placed before us containing three different sorts of, may I call them machines for the moment. Number 1 machine is entitled "The conventional lorry," as to which there is no doubt. The ordinary lorry, may I say the ordinary motor bus, would be a petrol-propelled vehicle. Some years ago you used to see in the streets of London quite a different sort of vehicle, which is instanced by No. 3 on the diagram which has been shown. That was the ordinary electric brougham, which is described as an accumulator-driven vehicle. Just as in case No. 1 there is no doubt that it would be described as a petrol-propelled vehicle, so in case No. 3 I think there could be no doubt that that accumulator vehicle would be described, and properly described, as an electrically-propelled vehicle. But this particular vehicle, the Tilling-Stevens Motor Bus, seems to be between the two, and it is, to some degree, a question upon which side of the line it is.

Now in construing a taxing Act which is, after all, meant to be of universal application, it is not proper to go into minute scientific and technical details. That, in my view, is not the test. In this particular case a gentleman,

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Mr. Gill, was called to describe the mechanism of the machine, and this is the sort of evidence he gave. On p. 19 of the shorthand note, which was to be taken as the judge's note, Sir Arthur Colefax asks: "What is the motive power to which this vehicle owes its propulsion? (A.) That is electric. The internal combustion engine does generate electricity by driving a dynamo, and electric current from the dynamo is then conveyed through suitable controllers to a motor and the motor, being driven by electricity, converts the energy which it receives, into power and drives. That has many practical advantages in smoothness of acceleration, because there is no gear changing." On p. 21 the argument proceeds on still more technical and still more scientific lines. Sir Arthur Colefax says: "Now take the electric carriage. I am referring to the vehicle with its accumulator, and I want you to tell my Lord, with regard to that case, first of all, is it a case where the means of producing the electrical energy are carried on the vehicle? (A.) That is so. (Q.) What are the means by which electricity is produced there? (A.) The charge plates of the accumulator—that is a chemical action of course—the lead peroxide on the one plate and the spongy lead on the other, and the sulphuric acid in between forming an electrolite." I should like to imagine what would be thought by the ordinary taxpayer if he had to consider, in the case of his particular vehicle: "Well, does the lead peroxide on the one plate and the spongy lead on the other, and the sulphuric acid between the two take place in my vehicle, and if so, does that combination of chemical energy bring me within the taxing Acts?" I think that is putting a burden on the taxpayer, when he has to consider whether or no he is liable for the tax, which is impossible. I cannot think that that highly minute and technical consideration has to be applied to the construction of the taxing Act. I agree with the Master of the Rolls in thinking that you must take the ordinary commercial meaning of the phrase in question.

Now what happens here? Let us trace for a moment the history of the bus in question. You start with the idea and,

indeed, at the beginning, with the construction of the ordinary, conventional lorry, No. 1; that is to say, the ordinary petrol-driven lorry. Then you find that the ordinary petrol-driven lorry has certain drawbacks. Now, what are the drawbacks? The drawbacks are the "abrupt and frequent changes of gear are translated into shocks which, as shown, are transmitted through the entire mechanism." Those words which I am reading are words in the advertisement form of the Tilling-Stevens Petrol Electric Bus Company. It says: "Abrupt and frequent changes of gear are translated into shocks, which as shown are transmitted through the entire mechanism. This has its effect on the life of the bus, and results in increasing the rate of wear of the parts. Ultimately the cost of maintenance is found to rise with an increase in the number of stops. On the average the number of changes in a gear-driven omnibus in London 'public service amount to 1500—1700 per day."

What do these gentlemen start, and very properly start, by wishing to do? They wish to improve the petrol bus. How are they going to do it? It seems to me that they do it by altering the method of transmission of power. They do not alter the character of the bus at all. In my view it still remains a petrol-driven bus, although they improve it in order to get rid of this effect produced by the frequent changes of gear. Their advertisement says, in big letters: "No gears. No clutch," and therefore it appears to me that we still have a petrol-driven bus, although it has this great advantage, that it has a different means of transmission of power which obviates the necessity of the gear and of the clutch. That, I think, is confirmed by their own pamphlet, to which we were referred, which is marked P. 3. It states on p. 7, with reference to this system, which I think still remains the system of a petrol-propelled bus: "The Clutchless Gearless Drive. The Tilling-Stevens Petrol-Electric System has been designed to provide the simplicity and smooth running qualities of the purely electric vehicle, without the great disadvantage of the battery—this system has also as its purpose the elimination of gear changing and consequently

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jerky running, the great drawback of the gear-driven vehicle. The petrol-electric vehicle, having no clutch, gear box or battery, has achieved this object. Principle. The primary motive power with the petrol-electric is a 4-cylinder internal combustion engine of the usual type. This is coupled through a spring drive to an electric generator, which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear."

Therefore, looking at the matter in the ordinary way, what has been done here is not to alter the character of the petrol-propelled bus but to improve it. It still remains a petrol-propelled bus, but it has a different system of transmitting the power from that which has prevailed in petrol-propelled buses hitherto. So much with regard to the history of the manner in which this new invention has been applied to the petrol-propelled bus. Just look at the two from the result. There is in fact no difference at all with regard to the petrol consumption. The gentleman who owns one of these buses still loads up with petrol; he does not load up with electricity. His petrol bill, so far as I can make out, is in no way diminished. In fact it remains in all its attributes just the same as the petrol-propelled bus, with the single exception that the transmission is different.

Now Sir Arthur Colefax endeavoured to meet that by laying down several categories. What he says is: Like the electric brougham, this vehicle is carrying in itself a potential source of electric energy; this is not merely a case of mere transmission of energy; it is a case of conversion of energy, and electric energy is transmitted to the motor. If I may be allowed to say so, I am perfectly convinced that, so far as the highly technical, scientific conclusions are concerned, Sir Arthur Colefax is perfectly right, and no doubt in highly technical, scientific language he has described the mechanism. But I venture to say that I do not think that is the test to be applied in construing this statute. In mercy to the tax-payer I do not think you could put upon him the onus of considering all these extraordinarily difficult, technical,

scientific and commercial questions. In fact this was really an improved petrol-propelled bus, and I cannot think that it comes within the category of an electrically-propelled bus. I am far from saying that the matter is clear beyond doubt; it may be that a criticism could be based upon this view, that we are legislating and not interpreting. I hardly think that is so, because it seems to me that the whole question is: What are the canons of interpretation we have to apply, and for the reasons I have given I do not think that the canons are those highly technical, scientific arguments which have been put forward.

I agree with the Master of the Rolls that these appeals should be allowed.

RUSSELL L.J. Were it not for the fact that the Master of the Rolls and Sankey L.J. are of opinion that these appeals should succeed I would have said the cases were plain, and that Clauson J.'s judgment was obviously right. That my colleagues should take a different view naturally fills me with distrust of my own opinion; but I hold my opinion so clearly that I feel bound to express it. Indeed, the correct answer to the problem submitted seems to me so plain that I begin to suspect that I must be wrong.

The vehicle with which this case is concerned—there are really two, but that is immaterial—is a mechanically-propelled vehicle "constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise." It accordingly is liable to duty, the rate of which depends upon the answer to this question: Is it, within the meaning of para. 5 of the First Schedule of the Finance Act of 1926, (*a*) a vehicle which is electrically-propelled or (*b*) a vehicle other than an electrically-propelled vehicle?

I will not repeat the description of the chassis of the vehicle in question. The illustration or diagram of it is in evidence, and appears as No. 2 in D. 1. The answer to the question is one purely of the construction of para. 5 of the First Schedule, read, I agree, without importing into it special

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technical or scientific knowledge, but read in accordance with the ordinary meaning and understanding of the English language. My feelings are similar to those of Lord Dunedin when, in *Trim Joint District School Board of Management* v. *Kelly* (1), he said: "Now, there is no authoritative test of what is the meaning of popular language. On such a matter we are bound to take our own personal experience as persons well acquainted with popular language. For myself, I confess that it seems so clear that in popular language the injury in this case was not an injury caused by accident, that it is difficult for me to use terms which might not appear wanting in respect to those who have expressed themselves otherwise."

What is the meaning of "electrically-propelled"? Surely, "propelled by electricity." Is this vehicle propelled by electricity? In my opinion, yes, and for reasons which may be expressed in the form of question and answer. (1.) Why does the vehicle move? Because the back axle and wheels rotate. (2.) Why do the back axle and wheels rotate? Because the cardan shaft rotates. (3.) Why does the cardan shaft rotate? Because it is operated by a motor. (4.) What is the power which drives the motor? Electricity. It thus appears that the mechanism which propels the vehicle (consisting of the back axle and wheels, the worm drive and cardan shaft) is driven by an electric motor. How in these circumstances the vehicle can be said not to be electrically-propelled, but to be a vehicle other than an electrically-propelled vehicle, is a question I feel quite unable to answer. In Lord Bramwell's classic phrase: "This beats me." (2)

It is true, no doubt, that the supply of electricity (which drives the electric motor, which rotates the cardan shaft) will become exhausted unless the petrol engine renews the supply; but the engine whose motive power is petrol does not propel the vehicle. It drives the dynamo, and so supplies with motive power the electric motor. The function of the

(1) [1914] A. C. 667, 685.

(2) *Bank of England* v. *Vagliano Brothers* [1891] A. C. 107, 138.

electric motor is to propel the vehicle. It has no other function. The function of the petrol motor is to generate electricity. It has no other function. It bears the same relation to the propulsion of this vehicle as the engine which generates electricity at the power station bears to the propulsion of the electric tram. The only difference in fact is that, in one case the vehicle carries its electricity generator with it; in the other it does not. No one would dream of saying that an electric tram is not electrically propelled because the electricity which in fact propels it is generated by an engine which may be a gas engine or an oil engine or a steam engine.

It is said that the prime source of power in this vehicle is petrol. That may be, but the fact appears irrelevant. The test of the statute is not prime source of power, but electrical propulsion. A decision in favour of the appellants must, it seems to me, involve this, that you except from the class of vehicles which are electrically-propelled, to which the first part of para. 5 applies, any vehicle which, besides being electrically-propelled, possesses some additional feature, such as that it carries its own electricity generator, or that it consumes petrol for some ancillary purpose. I can find in the statute no justification or foundation for any such exception, and I respectfully protest that, in allowing this appeal, this Court is (under the guise of doing what is called "looking at the substance of the matter") really usurping the functions of the Legislature.

In my opinion the vehicle in this case is a vehicle which is electrically-propelled and falls within the first portion of para. 5. Putting the matter in another way, it is not a vehicle other than an electrically-propelled vehicle so as to fall within the second portion of that paragraph.

In my opinion the appeals fail and ought to be dismissed.

Appeals allowed.

Solicitors: *The Treasury Solicitor; G. B. Hemming & Son, for Bracher, Son & Miskin, Maidstone; Godden, Holme & Ward.*

W. I. C.

D

ROMER J.
1928
June 13, 14.

In re NORTON.

PINNEY *v.* BEAUCHAMP.

[1928. N. 522.]

Settled Land—Compound Settlement—Trustees of Compound Settlement—Trustees having Powers of a Tenant for Life—Statutory Owners—No Trust for Sale—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 7; *ss.* 3, 7, *sub-ss.* 1, 5; *ss.* 17, 23, *sub-s.* 1.

On December 31, 1925, certain lands stood limited to the use of A. B. for life, and, after his death, subject to certain jointure rent-charges for life, and subject to certain portions which had been charged upon the estate, and which had been further secured by the limitation of a legal term, to the use of certain trustees upon trust for sale. The settlement under which the land so stood limited was a compound settlement, consisting of various documents, including two deeds of 1911 and 1913. In due course a vesting deed was executed in favour of A. B. A. B. died on December 4, 1926, and probate, limited to the settled land, was granted to the trustees of the compound settlement as his special representatives, on the footing that that settlement did not come to an end on his death. There were separate trustees of the two deeds of 1911 and 1913. Clause 11 of the deed of 1911 gave to the trustees thereof all the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890:—

Held, that the whole legal estate, the subject-matter of the settlement, was not held upon trust for sale.

Held, also that, in view of clause 11 of the deed of 1911, the trustees of the two deeds of 1911 and 1913 were persons on whom s. 23, sub-s. 1, of the Settled Land Act, 1925, conferred the powers of a tenant for life, and that they were statutory owners under the compound settlement. Therefore, when they sold the land they would sell it as statutory owners and not as trustees for sale, and they must pay over the proceeds of sale to the trustees of the compound settlement.

On December 31, 1925, the land, the subject-matter of this application, stood limited to the use of the second Lord Norton for life, and, after his death, subject to certain jointure rent-charges for life, and subject to certain portions which had been charged upon the estate, and subject to a legal term of years, which had been limited to secure such portions, to the use of certain trustees upon trust for sale. The settlement under which the land so stood limited was a compound settlement, consisting of a series of documents, which began with a settlement dated January 26, 1894, and substantially

ended with a document of July 27, 1922—a document which declared or altered the trusts to which the proceeds of the trust for sale were subjected. Therefore, on January 1, 1926, the legal estate in the land became vested in the second Lord Norton, the trustees of the 1894 settlement became trustees for the purposes of the Settled Land Act, 1925, of the whole compound settlement, and the rent-charges took effect in equity. In due course a vesting deed was executed, the effect of which was that the legal term of years for securing portions only took effect in equity. The second Lord Norton died on December 4, 1926, and probate, limited to the settled land, was granted to the trustees of the compound settlement as his special representatives, on the footing that that settlement did not come to an end on his death.

The present applicants were the trustees of two deeds of September 2, 1911, and July 31, 1913, and persons claiming to be beneficiaries under those deeds. Clause 11 of the deed of 1911 gave to the trustees thereof all the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890. This was an application under s. 2, sub-s. 2, of the Law of Property Act, 1925, and s. 93 of the Settled Land Act, 1925, and Order LV., r. 14 (*a*), of the Rules of the Supreme Court, and it asked: (1.) Whether the settled estates were, in the events which had happened, subject to a trust for sale within s. 2, sub-s. 2, of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, and the respective equitable interests subsisting under the various instruments or otherwise, and having priority to the trust for sale created by the deeds of 1911 and 1913 were capable of being overreached by the trustees for sale under those deeds, if approved under the provisions of sub-s. 2; (2.) if the answer to (1.) were in the affirmative, that the applicant trustees, as the present trustees of the deeds of 1911 and 1913, might be approved or appointed by the Court as trustees for sale within and for the purposes of s. 2, sub-s. 2, of the Law of Property Act, 1925, as amended, and that the trustees of the compound settlement, as the special personal representatives of the second Lord Norton in regard to the settled estates, might

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be directed to convey or otherwise vest such estates to or in the applicant trustees as trustees for sale; (3.) alternatively, if the settled estates remained settled land, under a compound settlement constituted by all or some one or more of the various instruments, whether the trustees for the time being of the deeds of 1911 and 1913 were, by virtue of s. 23, sub-s. 1 (*a*), of the Settled Land Act, 1925, the statutory owners within the meaning of that Act, and were entitled to require the settled estates to be conveyed or otherwise vested to or in them as such statutory owners.

Topham K.C. and *Bradley Dyne* for the applicants. The question here is whether the land is subject to a trust for sale or is settled land. If it is settled land, the applicants are statutory owners. A trust for sale arose on the death of Lord Norton, but there were certain equitable interests arising under the settlement which were still in existence and could not be overridden by the trustees for sale without the approval of the Court. In *In re Parker's Settled Estates* (1) a legal term of years existed; here, owing to the execution of a vesting deed, the legal term of years has been turned into an equitable one. The applicants, by reason of clause 11 of the deed of 1911, became statutory owners on the death of Lord Norton, because s. 23, sub-s. 1, of the Settled Land Act, 1925, confers on them the powers of a tenant for life. Therefore, under either or all of sub-ss. 1, 2, 3 and 4 of s. 7 of the Settled Land Act, 1925, the applicants are entitled to call for a conveyance of the legal estate from the trustees of the compound settlement. When that is completed, and they have the legal estate and are trustees for sale, the land can no longer be the subject-matter of a settlement, but must be held upon trust for sale. Following the reasoning in *In re Parker's Settled Estates* (1), the whole legal estate will be in trustees for sale.

Manning K.C. and *Greenland* for the trustees of the compound settlement. After the death of Lord Norton the land continued to be settled land. Trustees for sale must

(1) [1928] Ch. 247.

have a legal estate if they are to carry out the sale. Sect. 7, sub-s. 5, of the Settled Land Act, 1925, deals with a case where the settlement has come to an end. That is not the position here, and the sub-section cannot be called in aid. The words: "Subject to any order to be obtained under section 7 of the Settled Land Act, 1884," at the beginning of clause 11 of the deed of 1911 make it clear that the applicants cannot have the powers of a tenant for life conferred by s. 23, sub-s. 1, of the Settled Land Act, 1925, unless an order of the Court has been obtained, and no such order was ever obtained in this case. Under s. 155 of the Law of Property Act, 1925, the applicants can release their powers, and then the trustees of the compound settlement would come in under s. 23, sub-s. 1, of the Settled Land Act, 1925. There is no authority in these Acts which entitles the trustees of the compound settlement to abandon the position of holding the legal estate for the purpose of protecting the equities, and their view is that if they conveyed the legal estate to the applicants they would be committing a breach of trust.

Topham K.C. in reply.

M. Adams, *W. Copping*, *Fawell* and *E. Beaumont* for other parties.

ROMER J. The first question that arises upon this summons is whether the compound settlement came to an end on the death of the second Lord Norton. The solution of that question depends upon the answer to be given to the further question whether, on the death of Lord Norton, the land, which previously had been the subject-matter of the settlement, was held upon trust for sale within the meaning of s. 3 of the Settled Land Act, 1925. That section, as amended, says: "Land not held upon trust for sale which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as: (*a*) any limitation, charge, or power of charging under the settlement subsists,

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or is capable of being exercised." It is quite clear from that, that this land remains settled land after the death of the second Lord Norton, unless upon the happening of that event the land became held upon trust for sale. I had occasion recently in the case of *In re Parker's Settled Estates* (1) to consider the meaning of the phrase "trust for sale" as used in sub-s. 7 of s. 1 of the Settled Land Act, and for reasons that I then gave I came to the conclusion that land was not settled land where the whole legal estate, which would be otherwise subject to a settlement, was held upon trust for sale. But I also came to the conclusion that the land in question there was settled land, because there was outstanding in certain trustees a legal estate in a term of years for securing portions. The whole legal estate subject to the settlement was not therefore held upon trust for sale.

That being so, what I have to consider here is whether, on the death of Lord Norton, the legal estate in the whole subject-matter of the settlement, which undoubtedly had existed up to that date, was thereafter held upon trust for sale. Up to his death he had had the legal estate in fee simple, and that was the legal estate which was the subject of the settlement. On his death it vested in his personal representatives, his special representatives to whom probate had been granted, and was not vested in the trustees for sale. I must accordingly turn to s. 7 of the Act which is the section that provides what is to be done with the legal estate which becomes vested in his personal representatives on the death of a tenant for life, and for the purposes of the present case I need only refer to sub-s. 5, which is in these terms: "If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers, and charges taking effect under the settlement, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him." But the trustees for sale in this case have not become absolutely entitled to

(1) [1928] Ch. 247.

the settled land free from all charges taking effect under the settlement. There are certain equitable rent-charges which take effect in priority to the trust for sale. That being so, it appears to me that not only was the whole legal estate the subject-matter of the settlement not held upon trust for sale upon the death of the second Lord Norton, but that the trustees for sale as such had not, and have not now, a right to call for the legal estate. So far, I must, as it seems to me, come to the conclusion that on the death of the second Lord Norton the land did not cease to be settled land, but continued to be settled land and is still settled land.

But I must now deal with another matter. Under the document which constituted the trust for sale and declared the trusts of the proceeds of sale it was provided by clause 11 as follows: "Subject to any order to be obtained under s. 7 of the Settled Land Act, 1884, the trustees after the death of Lord Norton and Lady Norton shall have and may exercise in reference to any hereditaments for the time being subject to the trusts of these presents all the powers which are by the Settled Land Acts, 1882 to 1890, or any Act amending the same or by the said settlement conferred on a tenant for life in possession or a person deemed to be tenant for life in possession of land and may raise and pay out of capital or income any money required for the purpose of the powers hereby conferred and in the opinion of the trustees properly payable out of capital or income and so that the provisions of section 63 of the Settled Land Act, 1882, respecting capital moneys shall apply to all capital arising under the said powers." It is said by Mr. Topham on behalf of the present trustees of that deed, that having regard to that clause they are the statutory owners under this settlement after the death of the second Lord Norton. That is because by s. 23, sub-s. 1, of the Settled Land Act, 1925, it is provided as follows: "Where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life then: (*a*) any person of full age on whom such powers are by the settlement expressed to be conferred; and (*b*) in any other

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case the trustees of the settlement; shall have the powers of a tenant for life under this Act." Mr. Topham says that, having regard to that clause, his clients are persons on whom that section confers the powers of a tenant for life. It is said, however, by Mr. Manning, on behalf of the trustees for the purpose of the Settled Land Act of the compound settlement, that that is not so, because clause 11 begins as follows: "Subject to any order to be obtained under s. 7 of the Settled Land Act, 1884," and that that in some way qualifies or renders conditional the rest of the clause. I do not think it renders the rest of the clause conditional in any way. If one looks at the trusts declared of the proceeds of sale, it will be found that certain persons were entitled to the income of those proceeds for life, and that pending a sale the rents and profits were to be applied as if they were income arising from the proceeds of sale. There were, therefore, certain persons who would be deemed to be tenants for life of the settlement thereby created by reason of the provisions contained in s. 63 of the Settled Land Act, 1882. But a person deemed to be tenant for life under that section could not exercise the powers of the 1882 Act, unless he obtained an Order from the Court made under s. 7 of the Settled Land Act, 1884, and in my opinion these words "subject to any order to be obtained under s. 7 of the Settled Land Act, 1884," mean this: "without prejudice to the rights of any person deemed to be tenant for life under s. 63 of the Settled Land Act of 1882 who may obtain an Order under the Settled Land Act, 1884." That being so, the powers conferred upon the trustees of this deed are in the circumstances unconditional. I therefore come to the conclusion that Mr. Topham is right in his contention, and that his clients are the statutory owners under this compound settlement.

Mr. Topham then says, and says truly, that he is now entitled to call for a conveyance of the legal estate from Mr. Manning's clients under the earlier sub-sections of s. 7; that is to say, one or other of the sub-sections preceding sub-s. 5. That must be conceded. "But then," says Mr. Topham, "I shall have got the legal estate and I have a

trust for sale, and therefore the land is the subject-matter no longer of a settlement but of a trust for sale." That is an ingenious proposition, but on reflection I do not think it is one to which I ought to accede. He will get the legal estate no doubt, but he will get it, not as trustee for sale, but as statutory owner, and I do not think that merely by reason of getting it as statutory owner it is possible then to say that the legal estate in the land is subject to a trust for sale. In connection with this point my attention was called to s. 17 of the Settled Land Act, 1925. If Mr. Topham were right in his contention, and the settlement, although not coming to an end on the death of the second Lord Norton, came to an end the moment his clients, as statutory owners, got the legal estate, Mr. Manning's clients would personally be entitled to be discharged as trustees of the compound settlement for the purposes of the Settled Land Act. When, however, I turn to s. 17, I find a strong indication that the intention of the Legislature was that trustees for the purposes of the Act are not to be discharged so long as there is any equitable interest remaining outstanding which it is their duty to protect. I do not think it would be right, although they now have to transfer the legal estate to the statutory owners, to regard them as vesting the legal estate in the trustees for sale, and not in the persons who are statutory owners. If I were to assent to Mr. Topham's contention, the effect would be that I should be putting Mr. Manning's clients in the same position as though they had conveyed the legal estate to Mr. Topham's clients under s. 7, sub-s. 5, a thing they cannot be compelled to do.

On the whole I think I ought not to accede to Mr. Topham's contention, although no doubt in practice a certain amount of expense and, it may be, inconvenience would be obviated had I been able to do so. As it is, if and when Mr. Topham's clients sell the land, they will sell as statutory owners and not as trustees for sale, and the proceeds of sale will, of course, have to be paid to Mr. Manning's clients and not retained by Mr. Topham's clients, as would have been the case if I had been able to come to the conclusion

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that the land became subject to a trust for sale the moment the legal estate became vested in them.

Solicitors: *Linklaters & Paines; Hasties; Nash, Field & Co., for Docker, Hosgood & Co., Birmingham; Shirley, Woolmer & Co.; Clinton & Co., for Harrisons, Worcester; Peacock & Goddard.*

P. J. B.

C. A. 1928 CLAUSON J. *March* 1, 2. C. A. *June* 15, 18, 19; *July* 9.

In re KEYSTONE KNITTING MILLS' TRADE MARK.

[1927. K. 592.]

Trade Mark—Registration—Motion to rectify Register—Validity of original Registration after Expiration of seven Years—Motion launched before but not heard until after Expiration of seven Years' Period—Delay attributable to Process of Court—"Actus curiae neminem gravabit"—Ante-dating Judgment—"Legal Proceedings"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 41—*Rules of Supreme Court, Order* XLI., *r.* 3.

By the Trade Marks Act, 1905, s. 41: "In all legal proceedings relating to a registered trade mark (including applications under s. 35 of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of s. 11 of this Act."

On December 16, 1920, the respondents were entered on the register of trade marks as the proprietors of a certain mark. On July 15, 1927, the applicants, as aggrieved parties, gave notice to the respondents that they would move the Court for an order that the entry of the respondents' trade mark might be rectified or removed. The motion first came before the Court on July 22, 1927, when in accordance with the usual practice it was ordered that it should go into the non-witness list and directions were given as to filing evidence. The evidence having been completed the motion was entered in the non-witness list and came on to be heard before Clauson J. on March 1, 1928. At the hearing the respondents took the preliminary objection that under s. 41 of the Trade Marks Act, 1905, the seven years' period having expired on December 16, 1927, the registration of their mark must be taken to be valid in all respects, and that it was therefore now too late for the applicants to apply to remove it:—

Held, by Clauson J., that the respondents were not in the circumstances entitled to set up the validity of the mark under s. 41 of the Act, but that the applicants having effectively launched their motion before the expiration of the seven years' period, the Court, applying the legal

maxim "Actus curiae neminem gravabit," would, in order to do justice in the case, exercise its jurisdiction under Order XLI., r. 3, and ante-date its order.

Held, by the Court of Appeal (affirming the decision of Clauson J.), that s. 41 was not intended, and did not operate, to confer validity upon a trade mark which was otherwise improperly on the register and in respect of which an application was (before the relevant seven years had run out) pending to remove it from the register. The section was one which conferred rights and did not merely deal with a question of procedure or evidence, and should be so construed as to make it consistent with the general rule that rights were not altered as between parties after the commencement of litigation between them. The words "all legal proceedings" in the section must therefore be confined to legal proceedings commenced after the relevant period of seven years had expired.

Held, also (differing on this point from Clauson J.), that there was no necessity for Clauson J. to ante-date his order. If he had jurisdiction when he made the order to remove the mark no ante-dating was necessary. If he had not, he could not by ante-dating his order confer upon himself a jurisdiction which he did not otherwise possess.

MOTION.

On February 17, 1927, Keystone Knitting Mills, Ld. (hereinafter called "the respondents"), were entered on the register of trade marks as the proprietors of the mark "Charm" in class 38 in respect of hosiery. The date of the original registration of the mark by the respondents' predecessors in title was December 16, 1920.

Israel and Oppenheimer, Ld. (hereinafter called "the applicants"), were incorporated on November 17, 1919, and carried on business as merchants, dealing, in particular, in wearing apparel. In April, 1926, they were minded to sell certain hose under the mark "Isocharm," and applied to register that mark in class 38, but the registrar refused to register them as proprietors of that mark without the consent of the respondents, who were already the registered proprietors of the mark "Charm" in connection with hosiery. The respondents having refused to give their consent, the applicants thereupon proceeded on July 15, 1927, to give notice to the respondents that on July 22, 1927, they would move the Court for an order that the entry of the trade mark "Charm" might be rectified or removed or for such further or other order as to the Court should seem fit. The motion,

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supported by an affidavit, sworn on July 19 and filed on July 21, first came before the Court on July 22, 1927, when the course almost invariably followed, for the sake of convenience, in cases of motions under the Trade Marks Acts was taken, and an order was then made that the motion should go into the non-witness list, that the applicants should deliver particulars of objections as soon as possible, that the respondents should file evidence by October 1, 1927, and that the applicants were to be at liberty to file further evidence in reply within one month, with liberty for either party to cross-examine. In accordance with that order the applicants on August 11, 1927, delivered their particulars of objections that (amongst others) the word "Charm" was not at the date of registration, and was not then, a good and registrable trade mark, was not adapted to distinguish the goods of any one trader; bore direct reference to the character of the goods, and was at the date of registration, and was then, used by persons other than the respondents in respect of stockings. And in further pursuance of the order evidence was put in by the respondents by October 1, and evidence in reply was put in by the applicants on or about December 1. There was some question as to examination of books or discovery of documents. It was not thought convenient by the respondents to give discovery until the applicants had put in their evidence in reply; but discovery was given some time after December 1, and an affidavit by way of rejoinder was filed on January 4, 1928. Within a month from that date the motion was set down in the non-witness list, and came before Clauson J. for hearing on March 1, 1928.

Moritz K.C. and *H. Fletcher Moulton* for the respondents. We take the preliminary objection that it is too late to apply to have the mark removed from the register on the grounds stated in their particulars of objections. The applicants' objection that "Charm" was not at the date of the registration a good and registrable mark cannot now be taken, because more than seven years since December 16, 1920, the date of its registration, have now—that is to say, on

March 1, 1928, when this motion is heard—elapsed. Sects. 40 and 41 of the Trade Marks Act, 1905, which correspond with s. 76 of the Patents, Designs and Trade Marks Act, 1883, contain rules of evidence: the original registration is "to be taken" as valid. In considering whether the seven years' period has expired so as to render the original registration conclusive under s. 41, the crucial date is the date when the matter comes before the Court to be finally disposed of, and evidence is then tendered and the matter in dispute is determined. In these proceedings there has been no delay or default on the part of the respondents. In *Towler* v. *Chatterton* (1) two cases were referred to in the judgment of Park J., where the plaintiff suing on debt or simple contract more than six years after the cause of action, set up an oral promise to pay, but was non-suited on the ground that Lord Tenterden's Act (9 Geo. 4, c. 14) having come into operation before the trial applied, although it did not come into operation until after the commencement of the action. The language of s. 37 of the 1905 Act is clear: it speaks of no bona fide user of the mark during the five years "immediately preceding the application" to have it taken off the register. In construing the language of an Act of Parliament, if there is no ambiguity, it is not desirable to look further: per Coleridge J. in *Pocock* v. *Pickering*. (2) In s. 41 the language is different from that in s. 37, but it is equally clear; the sections contemplate legal proceedings pending at some time during the seven years' period.

Sir Duncan Kerly K.C. and *F. E. Bray* for the applicants. If s. 41 were dealing with procedure it might have the operation suggested by the respondents, as was the case with Lord Tenterden's Act in *Towler* v. *Chatterton*. (1) But the section is concerned with rights and not with procedure. Under the old Acts of 1875 and 1883 the registration of a mark was prima facie, and after five years conclusive evidence of the right of the registered proprietor to the exclusive right of user. Then under the 1905 Act it is no longer a matter of evidence: s. 39 confers a right; the registration, if valid,

(1) (1829) 6 Bing. 258, 265. (2) (1852) 18 Q. B. 789, 797.

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confers the exclusive right to use the registered mark. Sect. 41, in effect, says that, in certain events, an assumption is to be made as to the rights of the registered proprietor of a mark, at the time when the notice of motion is issued. From *John H. Andrew & Co.* v. *Kuehnrich* (1) it would appear that the critical date was that of the notice of motion. (2) There, contrary to the facts in the present case, the seven years expired before the notice of motion was given. Where under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the rent paid by a tenant in excess of the increase allowed by that Act is "recoverable" at any time within six months, it is sufficient if he takes some kind of legal proceedings within the prescribed period, and it is not necessary that he should have obtained judgment before the expiration of the prescribed period: *Diment* v. *Roberts*. (3) Legal proceedings having been launched before the seven years expired and having followed their normal course, the Court will not permit the delay which, owing to the ordinary process of the Court and not to any fault of the applicants, occurred before the final determination of the matter in question, to prejudice the rights of the applicants which crystallized at the date of the commencement of the proceedings. "Actus curiae neminem gravabit": Broom's Legal Maxims, 9th ed., p. 85.

[CLAUSON J. The Court has power in order to do justice to the applicants to ante-date its order: Order XLI., r. 3.]

Moritz K.C. in reply. In the Act with which *Diment* v. *Roberts* (3) was concerned, the word was "recoverable" not "recovered," as was pointed out by Swift J. in *Lewis* v. *McKay*. (4)

CLAUSON J. [after stating the facts above set out:] The order of July 22, 1927, was made in the form commonly followed in these cases, and for the reason that it is convenient, owing to the way in which the business of the Court is conducted, that a notice of motion of this kind should

(1) (1913) 30 R. P. C. 93, 677.
(2) Ibid.: p. 103, line 14; pp. 685, 686.
(3) [1925] 1 K. B. 9.
(4) [1924] 2 K. B. 136, 141.

not be dealt with on motion day in the ordinary course among other motions: it is more convenient that directions should be given for the completion of the evidence on the lines of the order which was in fact made.

The motion having now come before me, as counsel for the applicants was about to open it, counsel for the respondents took a preliminary objection—namely, that s. 41 of the Trade Marks Act, 1905, provides that at a date seven years from the date of the original registration—that date in this particular case is December 16, 1927—the original registration becomes, and must thenceforth be taken to be valid in every respect—there is an exception in the case of fraud, with which, of course, I need not deal—and he contends, accordingly, that the seven years from the date of the original registration of the respondents' trade mark having expired on December 16, 1927, their mark must, by the operation of s. 41, be taken to be valid, and that consequently it is useless to proceed with this motion.

So far as I know, nobody was alive to the point until quite recently; and what I have to consider is this: the motion having come before me on July 22, supported by evidence on the part of the applicants, which, for this purpose, I will assume, subject to any evidence to the contrary put in by the respondents, would establish the applicants' right to succeed on this motion, am I, nevertheless, forced, when the motion comes before me to-day (March 1) with the evidence for and against the application, to determine the motion, having regard only to the position before me to-day, or am I at liberty to consider and decide in accordance with the position at the date at which the application was made to the Court —namely, July 22? It is suggested that having regard to the fact that the period of the seven years expired on December 16, 1927, the Court can do nothing; that the registration is now valid and nothing can be done to disturb it; that, even if the applicants established that on July 22, when the respondents' registration was not yet validated, they were right in their claim for rectification of the register put forward before the Court on that day, nevertheless the

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Court is to-day impotent. If that be the case, the preliminary objection prevails, and obviously it is useless to consider the evidence.

Now the Court acts upon the principle that the unavoidable delays in the administration of justice shall not interfere with the rights of the parties. It is true that, if any particular delay has been occasioned by the delinquency or default of one of the parties, that principle will not apply. In this particular case I have no reason to suppose that there has been any improper delay upon either side. It is suggested that evidence might have been put in more quickly by the applicants, but it is not suggested that there was anything that could be attributed to the applicants as default. Under those circumstances what is the duty of the Court? I am assuming that, on the construction of the Act of 1905, the view put before me by counsel for the respondents is correct, that if I decide the matter as it stands to-day, I am bound to hold that the registration is valid; but it seems to me that I am not bound so to decide, and there is nothing in the Act which binds me so to decide. This Court is invested at common law with a power which enables it to do what it considers to be justice in a case of this kind, and that power seems to me to be re-enacted, if it were necessary to be re-enacted, by a rule of Court, Order XLI., r. 3, which gives the Court power, in a proper case, to ante-date or post-date its judgment. The principle upon which the Court has always proceeded is that in a case where justice requires it, the Court will treat itself as making its order as at the date at which it is necessary to treat it as made in order to do justice. The common case is where the Court has heard the matter on a particular day, but judgment has been reserved in order that the Court may put the ground of its order into a convenient form, and in the interval some one has died or something of that sort has occurred; in such a case, it has been quite common for the Court to treat itself as giving judgment on the day on which the matter was originally heard, although as a matter of fact the judgment is given long subsequently. That is done in pursuance of the Court's

common law power as assisted by the Order to which I have referred.

Now, assuming on going into the evidence in this case I find that, if the motion had been heard on July 22, on the materials now before the Court, the applicants would have succeeded, I think it would be lamentable if I were not in a position to put the applicants in the position they would have occupied, if on July 22, they having put in their evidence, the practice of the Court had been such as to enable the matter to be heard then or about that time. Accordingly, the course that I propose to take in this case is that, should it turn out now on the evidence before me that in July the applicants had a right to have the register rectified, I shall give effect to that right now by making an order in March, 1928, which will be ante-dated to such a date (not being anterior to the day on which the proceeding was properly brought before the Court—namely, July 22) as may be necessary for that purpose. The effect of that will be that when that order is brought to the attention of the registrar, he will, notwithstanding the Act, give effect to that order; and although the seven years have in fact passed, he will do that which he would have done, had the order in fact been made on the date it will bear, and drawn to his attention immediately afterwards.

Accordingly, in my judgment, this preliminary objection that has been taken fails, and it is my duty to hear this application and to decide whether or not, when this proceeding was effectively launched, as it was when it came before the Court on July 22, the applicants were entitled to have the register rectified.

The motion was then proceeded with, and Clauson J., after hearing arguments of counsel, held that the respondents' trade mark "Charm" bore direct reference to the character of the goods—namely, hosiery—in connection with which it was registered, and that the applicants' motion succeeded. Further, for the reasons stated in his Lordship's judgment upon the preliminary objection taken by the respondents, the order was directed to be ante-dated to a date in the

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sittings before Christmas, 1927—namely, December 15 (one day before the seven years from the original registration elapsed)—but as the Registrar of Trade Marks, although duly served with the notice, was not represented by counsel, his Lordship directed that the order should not be drawn up until the Registrar of Trade Marks had been given the opportunity of intervening should he think it proper so to do.

H. C. H.

C. A.

The respondents appealed. The appeal was heard on June 15, 18 and 19, 1928.

Moritz K.C. and *H. Fletcher Moulton* for the appellants.

Sir Duncan Kerly K.C. and *F. E. Bray* for the respondents on the appeal.

The preliminary objection taken by the appellants that it was now too late for the respondents to apply to remove the mark was first argued. On this point the arguments used in the Court below were substantially repeated. The following additional authorities were referred to: *Moon* v. *Durden* (1); *Gwynne* v. *Burnell* (2); *Freeman* v. *Tranah* (3); *Gilmore* v. *Shuter* (4); *Hitchcock* v. *Way*. (5)

Cur. adv. vult.

The appeal was then heard on the merits, and in the result the Court of Appeal held (affirming the decision of Clauson J.) that the respondents' trade mark "Charm" bore direct reference to the character of the goods—namely, hosiery—in connection with which it was registered, and that the applicants' motion succeeded. The appeal was accordingly dismissed.

July 9. The following written judgments were delivered:—

LORD HANWORTH M.R. The Keystone Knitting Mills, Ld., were the proprietors of a trade mark consisting of the word "Charm" registered on December 16, 1920, in class 38, in respect of hosiery being wearing apparel.

(1) (1848) 2 Ex. 22.
(2) (1840) 7 Cl. & F. 572, 607, 696.
(3) (1852) 12 C. B. 406.
(4) (1678) Sir T. Jones, 108.
(5) (1837) 6 Ad. & E. 943.

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On July 15, 1927, Israel and Oppenheimer, Ld., gave notice of motion to rectify the register of trade marks by expunging the said trade mark. Clauson J. heard the motion on March 1 and 2, 1928, and made an order rectifying the register by the removal therefrom of the trade mark No. 410,686 on the ground that the word "Charm" was and is descriptive, having a direct reference to the character or quality of the goods, and so failed to comply with the essential particulars contained in s. 9, sub-s. 4, of the Trade Marks Act, 1905. We have affirmed the decision of Clauson J. on this point. The respondents to the motion, however, raised another point on which we have reserved our judgment. It is this. The mark was registered on December 16, 1920. By s. 41 of the Act it is provided: "In all legal proceedings relating to a registered trade mark (including applications under s. 35 of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of s. 11 of this Act."

It was contended that, at the hearing of the motion, the period of seven years had expired, and that the mark had thus become indefeasible and must be taken to "be valid in all respects," for no suggestion was raised that the exceptions contained in the section as to the mark having been obtained by fraud or offending against the provisions of s. 11 of the Act applied. Clauson J. overcame this difficulty by ante-dating his judgment to December 15, 1927—the day before the seven years had elapsed—under the provisions of Order XLI., r. 3.

I have grave doubts whether the power contained in that rule can be used to defeat the right of a party if it has been acquired at the time when the judgment is given. It is, however, unnecessary to express a final opinion upon that point, because in this judgment I have, for other reasons, come to the conclusion that the seven years had not elapsed

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at the time relevant for consideration, and thus that the trade mark ought not " to be taken to be valid in all respects."

By s. 39 the right given to a registered proprietor of a trade mark is defined. By s. 40 registration is to be prima facie evidence of validity, and then s. 41 makes registration conclusive after the lapse of seven years from the date of the original registration of the mark. Although the terminus a quo is stated, the terminus ad quem is not defined. Counsel for the appellants argued that by the phrase contained in the section, " in all legal proceedings," the terminus ad quem was left open so that the seven years could be said to have expired, with effective results, if at any point of time in the legal proceedings when the matter came up for decision the seven years had elapsed—whether that point of time was found in the proceedings before the judge of first instance, or later in the course of the hearing of the appeal or appeals from the decision of the judge who heard the motion.

Such an indecisive and variable terminus involves obvious difficulties and inconveniences. The Court of first instance might have decided that a mark ought not to be removed from the register. This decision when taken to the Court of Appeal may prove to be erroneous. Yet if when the case was heard by the Court of Appeal the seven years had elapsed, the Court would be powerless to reverse the decision, although wrong, because the mark had acquired indefeasible validity. It is, however, necessary to construe s. 41 and to determine its meaning. " Proceeding " is an inclusive term and may be used to include any kind of action, as it was held to do in *Pryor* v. *City Offices Co.* (1) Under s. 85 of the Companies Act, 1862, which gave the Court power after the presentation of a petition for winding up a company under the Act " to restrain further proceedings in any action, suit, or proceeding against the company," it was held that an order might be made to stop proceedings to recover penalties for alleged offences under the Act and the Life Assurance Companies Act, 1870: *In re Briton Medical and General Life Assurance Association.* (2) The words " other legal proceeding " in

(1) (1883) 10 Q. B. D. 504. (2) (1886) 32 Ch. D. 503.

s. 18, sub-s. 10, of the Patents, Designs and Trade Marks Act, 1883, were held to include a proceeding for the revocation of a patent (see *Cropper* v. *Smith* (*No.* 2) (1)) and s. 41, which is under consideration, expressly includes applications under s. 35 of the Trade Marks Act, 1905, within the term "legal proceedings." By the Judicature Act, 1873, s. 100, now replaced by s. 225 of the Judicature (Consolidation) Act, 1925, "action" is defined to mean "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court."

The phrase, therefore, in s. 41, "in all legal proceedings relating to a registered trade mark" is designed to embrace all processes by which matters relating to a trade mark are brought to the attention of the Court, whether in an action commenced by a writ for by motion or originating summons. The words, however, are "in all legal proceedings," and not in any step in any proceeding. In *Pryor* v. *City Offices Co.* (2) already referred to, an argument was presented that the words "in any proceeding" in s. 89 of the Judicature Act, 1873, ought so to be construed: but it was rejected. The Court held that as in s. 90 of the same Act, so in the earlier section the words must be read as "in any action." "They do not mean in any step in an action, but in the action itself": see per Brett M.R. (3) The above sections are now replaced by ss. 202 and 203 of the Consolidation Act, 1925.

An action is one of the ways in which a litigant seeks redress from the Courts, but whether the approach is made to the Court by that or by other means, the cause of action in respect of which a litigant approaches the Court of justice must be complete at the time when he issues his process.

A recent illustration that the date at which the rights of the parties are to be determined is the commencement of the action or proceeding is found in *Diment* v. *Roberts* (4), where a time limit for a sum recoverable within six months was held satisfied if some kind of legal proceeding to recover it was taken within that period. If the Court were not

(1) (1884) 28 Ch. D. 148.
(2) 10 Q. B. D. 504.
(3) 10 Q. B. D. 504, 508.
(4) [1925] 1 K. B. 9.

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otherwise occupied, the cause might be determined with a minimum of delay. There is no opportunity allowed for the cause of action to ripen in its course before hearing. In the case of an application to remove a trade mark from the register, the onus lies upon the applicant to establish his case: *In re Chesebrough's Trade Mark "Vaseline"* (1), and he must be prepared to discharge that onus at the moment when he makes his application. If matters subsequent to the date of the commencement of the action or proceeding are to be taken into account, it must be by virtue of some special provision or rule, such as Order XXXVI., r. 58, under which damages in respect of a continuing cause of action are to be assessed down to the time of assessment.

Applying these rules and considerations to the present s. 41, it appears to me not to be possible to construe the words in the section as altering the principles which apply to all legal proceedings and the usual practice relating to them, and that the phrase "in all legal proceedings" must be interpreted as meaning all legal proceedings commenced after the seven years' period has elapsed. The purpose of s. 41 is to consummate a possessory title obtained by registration into an absolute title. It cannot intend that the rights of the parties, inter se, are to be altered as one step in the proceeding follows another.

The analogy suggested as to a document proving itself, if thirty years old, when tendered—taking that to be the correct limit—is not a true one. Such a document carries with it on its face a presumption of due execution, and relieves the party from calling other evidence or witnesses at the trial. The rule facilitates proof; it does not, per se, alter the rights of the parties, although it may be a factor in reaching the determination of the issue between them.

For these reasons it appears to me that the contentions of the appellants on this point also fail. The appeal must be dismissed with costs.

LAWRENCE L.J. I agree. In my judgment s. 41 of the Act of 1905, when taken in conjunction with s. 39 of the

(1) [1902] 2 Ch. 1.

same Act, operates to confer a right upon the registered proprietor of a trade mark, and does not merely lay down a rule of evidence or procedure. The expression "all legal proceedings" used in the section is intended to denote every kind of legal proceeding (including expressly an application for the rectification of the register under s. 35) whether commenced by writ or by any other process. In my opinion the expression is not used to denote the steps in a legal proceeding, but the legal proceedings themselves.

It is an almost universal rule that the Court sits to determine the rights of parties as existing at the time of the institution of the legal proceedings, whatever form such proceedings may take. This rule is, in my opinion, applicable to the right conferred on the proprietor of a registered trade mark by s. 41, with the result that the question whether in any particular legal proceeding relating to a registered trade mark such trade mark is or is not to be taken as valid in all respects depends upon whether at the time of the institution of such proceeding the period of seven years from the date of the original registration has or has not expired. If that be the right view, it follows that the crucial date, which determines whether a legal proceeding is a proceeding in which, according to s. 41, the trade mark is to be taken to be valid, is the commencement of such proceeding, and that the section does not apply to any legal proceeding commenced before the expiration of the seven years' period.

If, as was at first contended by counsel for the appellants, the hearing of the action or matter in the Court of first instance were the crucial date, the strange result would follow that the rights of the litigants might depend entirely upon whether the party having the conduct of the proceeding were able and willing to prepare for the hearing with promptitude and upon whether (even if such party were expeditious in this respect) the business of the Court would permit of the case being heard before the expiration of the seven years' period. Thus an aggrieved person might be deprived of his right to have the register rectified through no fault of his own.

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Counsel for the appellants endeavoured to get over such a strange result by suggesting first that the maxim "Actus curiae neminem gravabit" should be applied as to any delay in the hearing caused by a congestion in the business of the Court, and that in such a case the crucial date should be the date when the parties were ready for the hearing; and secondly in the alternative that the crucial date should be the date when the original registration was first put in evidence in the legal proceeding. Neither of these suggestions however really meets the difficulty. As to the first it does not meet the case where the delay is not attributable to the act of the Court but to an act of one or other of the parties (e.g., wilful obstruction by a party other than the aggrieved person) or to some unforeseen or unavoidable event (e.g., the absence abroad or illness of a material witness), in neither of which cases the maxim would apply: see *Freeman* v. *Tranah*. (1) As to the second, it is plain that in many cases neither the aggrieved person nor the registered proprietor might have an opportunity of putting the original registration in evidence before the actual hearing. Moreover, the section does not appear to contemplate that any particular stage in a legal proceeding should be the crucial date.

Logically it seems to me that the crucial date must either be the date of the commencement of the particular legal proceeding, or else it must be left open, notwithstanding the institution of that proceeding, in which latter case it would be the duty of every Court, from the moment of the effluxion of the seven years' period, to treat the mark as a valid mark, whatever stage the proceeding might then have reached and in whatever Court it might then be pending, which, as pointed out by the Master of the Rolls, might lead to an extraordinary result.

In my opinion the language of the section is more consonant with an intention that a mark should or should not be taken to be valid throughout the whole course of the same legal proceeding, than with an intention that in one and the same legal proceeding there might be a period of time during

(1) 12 C. B. 406.

which the mark is not to be taken to be valid, and another period during which it is to be so taken. Assuming, however, that the language of the section were equally consistent with both intentions, it is a sound rule of construction that if, without doing violence to the language employed, a statute can be construed so as to lead to a reasonable rather than an unreasonable result, it ought to be so construed. Applying this rule to the present case, and bearing in mind that the section confers a right and is not merely a rule of evidence or procedure, I am of opinion that the true construction of the section is that indicated by me in the earlier part of this judgment.

For the reasons stated, I am of opinion that s. 41 does not apply to the present proceedings, and that the appeal fails.

I will only add that in my opinion there was no need for the direction given by the learned judge to ante-date his order. Either the learned judge at the time when the case came before him had jurisdiction to make an order striking the mark off the register, or had no such jurisdiction. The existence or non-existence of the jurisdiction does not in my opinion depend upon whether or not the judge who hears the case is minded to exercise any discretion he may have to ante-date his order, or is not so minded.

RUSSELL L.J. I agree that this appeal fails. In my opinion s. 41 was not intended, and does not operate, to confer validity upon a trade mark which is otherwise improperly on the register and in respect of which an application is (before the relevant seven years have run out) pending to remove it from the register. The section is one which confers rights; it does not merely deal with a question of procedure or evidence. The general rule is, I think, clear—namely, that rights are not altered as between parties after the commencement of litigation between them. In my opinion (whether the section confers rights or only relates to a question of procedure or evidence) the section should, if it be possible, be construed so as to make it consistent with that general rule. It is in my opinion possible so to

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construe s. 41, by confining the words " all legal proceedings " to legal proceedings commenced after the relevant period of seven years has expired.

I also agree with the view that there was no necessity for the learned judge to ante-date his order. If he had jurisdiction when he made the order to remove the mark, no ante-dating was necessary. If he had not, I do not, as at present advised, see how by ante-dating his order he could confer upon himself a jurisdiction which he did not otherwise possess.

Appeal dismissed.

Solicitors: *McKenna & Co.; Emanuel & Simmonds.*

W. I. C.

ASTBURY J. 1928 *Oct.* 22.

In re JAWETT.

[578 of 1928.]

Bankruptcy—Public Examination—Conduct of Debtor—Past Transaction leading to Bankruptcy—Sale of infringing Lamps—Injunction—Costs—Non-payment—Refusal of Bankrupt to state where he obtained Lamps—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 15, 73.

In November, 1927, the debtor, who had practically no capital of his own, suffered judgment for an injunction and costs for selling lamps in infringement of a patent.

In August, 1928, the debtor was adjudicated bankrupt on the patentees' petition for non-payment of those costs.

At his public examination on Octob r 19, the bankrupt, who was admittedly still dealing in electrical goods, on being asked by the Registrar where he had obtained the lamps that he sold when he was in business, refused to answer the question :—

Held, that as it was not clear that the disclosure of the source of supply might not lead to the disclosure of further assets, e.g., claims to commission or otherwise, or might not be in the public interest, by enabling the supply of infringing lamps to be stopped at its source, the bankrupt must answer the question.

In re Paget [1927] 2 Ch. 85 and *In re Atherton* [1912] 2 K. B. 251 applied.

ON November 8, 1927, the British Thomson-Houston Company, Ld., obtained judgment for an injunction, damages and costs against Jawett for selling lamps in infringement of their patents.

The costs were taxed at 68*l.*, and on August 22, 1928, Jawett was adjudicated a bankrupt on the patentees' petition founded on his failure to comply with a bankruptcy notice in respect of those costs. No trustee was appointed, and the official receiver remained trustee.

On October 15, in view of the public examination under s. 15 of the Bankruptcy Act, 1914, which was fixed for October 19, the official receiver made a report stating (inter alia) that it appeared from the bankrupt's statements that he was a Polish Jew who came to England in 1913, and except during his internment as an alien from 1914 to August, 1917, he was in employment until 1925. He then, with a capital of 20*l.*, commenced dealing in cycles, gramophones and electric lamps at his residence, 58 Bedford Street, E., but after two months trading he dropped the cycle and gramophone business and continued the electric lamp business only. He had kept duplicate sales books for his business, but these had not been produced.

At his public examination on October 19 the bankrupt admitted that he was still dealing in electrical goods. Several instances of importation of lamps in his name from Austria in September, 1927, and totalling 1000*l.* were put to him by the petitioners, all of which he denied. The Registrar then asked him, "Where did you get the lamps from, that you sold when you were in business?" The bankrupt, while admitting that he knew the name of the London firm who supplied the lamps, declined to answer the question on the ground that it might incriminate people who had trusted him. He did not know where that firm got the lamps. As he had not had any of the specified Austrian importations he had not had to find the 1000*l.*, and could not say how he would have got that amount if he had required it.

The Registrar thereupon directed this refusal to answer to be reported to Astbury J. on October 22.

Tindale Davis for the Registrar. The refusal to answer is reported to the Court under r. 86 and follows Form 68. This question was directly put by the Registrar, so the onus of

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showing that it need not be answered lies on the bankrupt. He must show that it is neither in the public interest, nor can it disclose further assets. But it clearly goes to the debtor's conduct which the official receiver has to investigate under s. 73, and non constat that it will not lead to the disclosure of further assets, e.g., unpaid commission or share of profits. The law on the point is exhaustively stated in *In re Paget* (1) and *In re Atherton*. (2)

C. Gallop for the bankrupt. This question is neither in the public interest, nor will it disclose further assets. It is therefore quite irrelevant to any matter in this bankruptcy: *In re Paget*. (1) It is not suggested that the bankrupt has committed any misdemeanour under the Bankruptcy Act. The question is merely asked in the creditors' interests to enable them to take proceedings against the infringing firm.

[ASTBURY J. Suppose the bankrupt was party to a fraudulent conspiracy to plant infringing lamps on the public. Surely it is in the public interest to stop this. Or suppose he was a commission agent or even a partner with the infringers. He might have a claim to commission or a share of profits. In this way the answer might possibly disclose further assets.]

That possibility would justify any question.

[ASTBURY J. Well. Take the point of public interest. Purchasers of infringing lamps are being placed in peril of litigation day by day. Here is an opportunity to stop it.]

The Bankruptcy Court ought not to perform the functions of a detective agency. Of course, if the bankrupt were asked whether he was still selling infringing lamps, and where he was getting them, he would answer at once. But this is a wholly past transaction, and the question is really irrelevant to any matter in this bankruptcy.

Tindale Davis in reply.

ASTBURY J. [after stating the facts:] The specific question which the bankrupt refused to answer and which refusal is reported to the Court was, "Where did you get the lamps from, that you sold when you were in business?" The

(1) [1927] 2 Ch. 85, 87. (2) [1912] 2 K. B. 251.

bankrupt's counsel, who has argued the case with great ability, contends that this question is not relevant to any matter in the bankruptcy. I am unable to take that view.

In *In re Paget* (1) Lord Hanworth M.R., after stating that s. 15 required that a bankrupt should be publicly examined as to his affairs, said: "I use that word comprehensively, the object of the examination being not merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court by those who are charged to carry out the examination of the debtor. To concentrate attention upon the mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law."

The actual decision has no bearing on the facts of the present case. But the principle is plainly stated that the object of the public examination is partly for the protection of the public. The Court agreed with the decision of Phillimore J. in *In re Atherton* (2), that in a public examination the debtor is not entitled to refuse to answer questions on the ground that the answers may incriminate him, the purpose of the Bankruptcy Act being to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of the creditors.

The only question is whether the bankrupt has shown that the Registrar's question was irrelevant on both these points. I do not take that view. The bankrupt was carrying on a particular business in which he sold lamps infringing these well known and extensive patents. The courts are frequently called on to grant injunctions in these cases. This debtor was caught while carrying on this business, and suffered judgment for an injunction and costs, for non-payment

(1) [1927] 2 Ch. 85, 87. (2) [1912] 2 K. B. 251.

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of which he has been made bankrupt. He is now unwilling to throw any light on his business dealings, and though he has kept books of his sales, he has not thought fit to produce them.

There are many reasons why the answer to the Registrar's question may be relevant. The bankrupt had practically no assets of his own and yet he dealt in these infringing lamps. How did he get money to pay for them? He may have worked on commission or on a fixed remuneration or otherwise. If the name of the man who supplied him is obtained, that man can be examined, with a possible disclosure of further assets.

Secondly, the answer may also be relevant in the interests of the public. There is a very large trade in these infringing lamps, involving innocent members of the public who purchase them in litigation. It is in the public interest that the bankrupt should disclose his source of supply and I order him to answer the question.

Tindale Davis. The proper order is committal, with a suspension over the adjourned examination, to see if he answers the question.

ASTBURY J. Very well. The committal order will lie in the office over the adjourned examination on that footing. But if the bankrupt is too ill to attend, or appeals before the date of that adjourned examination, there must be a further suspension.

Solicitors: *Bristows, Cooke & Carpmael; Strong & Co.*

G. R. A.

In re DUCKER'S TRADE MARK.

C. A. 1928 *June* 28, 29.

[1927. D. 1357.]

Trade Mark—Registration—Non-user—Bona fide Intention to use—Contingent Intention—Removal of Mark—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 37.

The bona fide intention to use a trade-mark in connexion with the goods for which it is registered, as required by s. 37 of the Trade Marks Act, 1905, means a definite and present intention on the part of the proprietor so to use it.

The section is not satisfied by a precautionary registration with a contingent intention of using the mark if occasion requires.

So *held* by the Court of Appeal, affirming the decision of Tomlin J.

In re Batt's Trade Marks [1898] 2 Ch. 432, 439, 440 applied.

APPEAL from a decision of Tomlin J. (1)

On March 25, 1924, Mrs. Ducker registered the invented word "Notox" in class 48 in respect of "dyes for the hair."

The mark was registered in the following circumstances: For some years before March 25, 1924, Mrs. Ducker and her husband Noel and his brother Philip had been interested in various hair-dye companies as directors or shareholders, and at the date of registration Mrs. Ducker, though no longer a director, was manager of the laboratories of company A, in which dyes were mixed and preliminary experiments conducted, before the dyes were tried on the customers. Mrs. Ducker was engaged in perfecting on her own account a secret process for a new hair-dye for which the name "Notox" had been evolved and discussed between Noel and Philip. There was conflicting evidence as to whether the word was first invented by the Duckers or by the applicants, an American hair-dye company, but the Court held that the Duckers invented the word, and that the applicants heard of it through Philip, on the occasion of his assigning his own interest in the applicants' business to the applicants.

(1) [1928] Ch. 405.

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In 1922 criminal proceedings were commenced against Noel and Philip on a charge of conspiring to defraud the Inland Revenue. Philip escaped to France. Noel stood his trial and was acquitted on March 19, 1924; but shortly before this, on her husband's advice, Mrs. Ducker had applied to register the trade-mark so as to have something to start business with if anything happened to her husband and she were thrown on her own resources.

The mark was registered on March 25, 1924, but as Noel had been acquitted there was no immediate necessity for Mrs. Ducker to start a business on her own account, and she did not trouble herself about the mark for some three years.

At the date of registration the new dye was in fact being experimentally used by another company B in which the Duckers were interested in order to see whether it had all the necessary qualities, but the name "Notox" was not used, nor had Mrs. Ducker any business of her own. She never in fact intended to start a business in her own name and use the mark herself. She intended, if occasion arose, to assign the mark and secret process when perfect to a limited company to be formed for the purpose of using it, so as to avoid the risk of carrying on a hair-dye business in her own name.

On September 26, 1924, the applicants, who on August 26, 1924, had registered "Notox" in the United States, applied for registration in England, but found they were blocked by Mrs. Ducker's mark. They did nothing further, but waited to see if the mark were used.

On May 9, 1927, Mrs. Ducker, who and whose husband knew nothing about this application, formed a private limited company called Notox, Ld., to use the mark and secret process. The capital was 100*l.* in 100 shares and the directors were Noel and Smith.

On July 4, 1927, Mrs. Ducker assigned the secret process and the trade-mark to the company with the right to manufacture and sell the hair-dye and to use the name "Notox" in consideration of ninety-eight fully paid shares.

On July 18, 1927, the applicants applied under s. 37 of the Trade Marks Act, 1905 (1), to remove the mark on the ground that it was registered by Mrs. Ducker without any bona fide intention to use it in connexion with hair-dyes, and that there had in fact been no bona fide user in connexion therewith. They also contended that the assignment was bad under s. 22, as no goodwill then existed, and that the attempted assignment amounted to abandonment.

The motion was originally launched against Mrs. Ducker alone, but the company, Notox, Ld., were added at the trial.

Tomlin J. held that the mark must be removed from the register on the ground that there had been "no bona fide intention to use the same" within the meaning of s. 37 of the Act of 1905, and no user in fact.

The respondents appealed. The appeal was heard on June 28 and 29, 1928.

Moritz K.C. and *F. E. Bray* for the appellants. The only ground on which the mark has been ordered to be expunged is that there has been no bona fide intention to use it in connexion with the goods for which it is registered and no user in fact, so that s. 37 of the Act applies. The applicants launched their application on an allegation that the registration of "Notox" by Mrs. Ducker was mala fide in the sense that it was a mere blocking registration to prevent the applicants from registering that mark. But Tomlin J. found in favour of Mrs. Ducker on this question and only quashed the

(1) Sect. 37: "A registered trade-mark may, on the application to the Court of any person aggrieved, be taken off the register in respect of any of the goods for which it is registered, on the ground that it was registered by the proprietor or a predecessor in title without any bona fide intention to use the same in connexion with such goods, and there has in fact been no bona fide user of the same in connexion therewith, or on the ground that there has been no bona fide user of such trade-mark in connexion with such goods during the five years immediately preceding the application, unless in either case such non-user is shown to be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade-mark in respect of such goods."

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registration of the mark on technical grounds under s. 37. In deciding that there was no bona fide intention to use the mark Tomlin J. founded himself on *In re Batt's Trade Marks* (1), where the test was said to be whether there was any "definite and present intention" to use it. That case was, however, decided under the Patents, Designs, and Trade Marks Act, 1883, ss. 72, 75, 76, which do not closely correspond to s. 37 of the Trade Marks Act, 1905. At that time there were not two separate conditions, bona fide intention to use and user in fact. It is contended that in making "bona fide intention to use" necessary, s. 37 intended only to exclude cases where registration is for some ulterior reason only, such as blocking some other application. The words "bona fide" in the context "and there has been no bona fide user" can only be meant to cover a case where the user has been bogus. And if "bona fide" has to be contrasted with "bogus" there, the same must be true in the earlier words "without any bona fide intention to use." It follows that "bona fide intention" is not equivalent to a "definite and present intention." The law as it stood in *In re Batt's Trade Marks* (1) has been altered by s. 37 of the Act of 1905. The plain meaning of the words "bona fide intention to use" is an intention to use for no ulterior purpose.

Sect. 3 of the Act of 1905 defines a "trade-mark" as "a mark used or proposed to be used upon or in connexion with goods." It is, therefore, sufficient to propose to use it. There was no evidence here on which it could be held that there was not a definite and present intention to use it. The fact that a mark could be registered though only "proposed to be used" shows the great change in the law since *In re Batt's Trade Marks* (1). Under the Act of 1883 registration of a trade-mark conferred no new right. The register was merely evidence of a right which otherwise existed at common law. Under the Act of 1905 a mark can be registered before use, and an artificial right to the mark is thereby created, and it is only if there has been no bona fide user for five years

(1) [1898] 2 Ch. 432, 439, 440; affirmed [1899] A. C. 428.

that the mark can be taken off the register under s. 37. All that is required is a bona fide intention to use the mark at some time. The registration must be with a genuine intention of using it in connexion with goods, and if so the Act is satisfied.

Again it is sufficient if the person registering has a bona fide intention to use the mark through a company. It would be a serious thing if this were not so.

[LAWRENCE L.J. That might be so if the person registered was trustee for the company. There is a great difference between that and a case where the person registered the mark intending either to use it himself or to sell it to a company.]

It is submitted that in the latter case also the Act would be complied with.

Even if *In re Batt's Trade Marks* (1) applied, Tomlin J. has confused "definite and present intention to use" with a "definite intention to use at the present time." It is the "intention" that has to be a present one and not the user. Here Mrs. Ducker certainly meant, when she obtained registration of the mark, to use the mark at some time either herself or by a company.

But assuming that jurisdiction exists to take the mark off the register, still the Court should take into account the demerits of the applicants and the merits of the person who is registered, as well as the interests of the public. It is for the Court to exercise its discretion having regard to all the circumstances: *Paine & Co.* v. *Daniell & Sons' Breweries, Ld.* (2) For these reasons the mark should not be removed.

[They also referred to *In re Neuchatel Asphalte Co.'s Trade Mark* (3); *Eastman Photographic Materials Co.* v. *John Griffiths Cycle Corporation* (4); *Scott Paper Co.* v. *Drayton Paper Works.* (5)]

Hon. Stafford Cripps K.C. and *Lionel Heald* for the respondents were not called upon to argue.

(1) [1898] 2 Ch. 432; [1899] A. C. 428.
(2) (1893) 10 R. P. C. 217.
(3) [1913] 2 Ch. 291.
(4) (1898) 15 R. P. C. 105, 111.
(5) (1927) 44 R. P. C. 151, 529.

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LORD HANWORTH M.R. In our judgment this appeal fails. It is unnecessary to restate the facts, which fully appear in the report of the case when heard by Tomlin J. in the Court of first instance. (1) After referring to the facts Tomlin J. says (2): "I am quite satisfied that at the time of registration Mrs. Ducker had no intention of using the mark herself, and that neither she nor her husband Noel would ever have dreamed of going into business for the purpose of marketing hair-dyes in their own names or otherwise than through the hand of a limited company. Further, I think that Mrs. Ducker registered the mark at that time really as a sort of precaution, in order that she might have something that might be of some service to her if difficult times came. Happily for her, they did not come, and I really think she did not trouble about the mark for some three years. Although no doubt there was an intention of some sort to use the mark; that is to say, that the mark was thought to be something which some day might be useful, I do not think there was, at the time of registration, any definite and present intention to use it within *In re Batt's Trade Marks* (3), the language in which is as appropriate to-day as when that case was decided."

That is the summary of the facts from which inferences are drawn by Tomlin J., and we have to consider whether, upon the facts and the inferences drawn by the learned judge, he has rightly construed the sections of the Trade Marks Act, 1905, on which his jurisdiction is based. It is said that the law was different at the time when *In re Batt's Trade Marks* (4) was decided. That is true. But the question is whether the reasoning of *In re Batt's Trade Marks* (4) still applies to the law as now appearing in the Act of 1905. Tomlin J.'s view is that that reasoning does apply. Sargant J. (as he then was) is of the same opinion, and he held in *In re Neuchatel Asphalte Co.'s Trade Mark* (5)—a case decided, be it noted, after the Act of 1905 had been passed—namely, in 1913—that the reasoning of *In re Batt's Trade Marks* (4) was still applicable.

(1) [1928] Ch. 405.
(2) Ibid. 409.
(3) [1898] 2 Ch. 432, 439, 440.
(4) [1898] 2 Ch. 432.
(5) [1913] 2 Ch. 291, 301.

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Lord Hanworth M.R.

In *In re Batt's Trade Marks* (1) Lindley L.J. (as he then was) stated the question of law which there arose as follows (2): "Can a man properly register a trade-mark for goods in which he does not deal or intend to deal?—meaning by intending to deal having at the time of registration some definite and present intention to deal in certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative. To answer it otherwise would be unduly to strain the language of the Acts relating to trade-marks, and to render those Acts extremely mischievous instead of beneficial to trade and commerce."

When that case was in the House of Lords, in the course of the arguments Lord Halsbury said (3): "The Trade Mark Acts are not for copyright in marks, they are to protect trade-marks"; and then he goes on with the sentence that is challenged: "If you have no goods you are claiming only copyright, you are not claiming for the purpose of protecting your trade." It may be that that last sentence is rightly subject to the criticism which Mr. Bray has made upon it; but the earlier sentence appears to me to contain, as is so often the case in the observations of Lord Halsbury, a very incisive truth, "The Trade Mark Acts are not for copyright in marks, they are to protect trade-marks."

On the observations which had been made by Lindley L.J. and also the observation made by Lord Halsbury—the one in particular to which I have referred—the Act of 1905 was based.

It is quite true that the Patents. Designs, and Trade Marks Act, 1883, differs largely from the Trade Marks Act, 1905, in several particulars, e.g. there is no definition in the earlier Act of a trade-mark. The section in the earlier Act which gives the right of exclusive use of trade-marks, s. 76, only says this: "The registration of a person as proprietor

(1) [1898] 2 Ch. 432.
(2) Ibid. 439.
(3) *John Batt & Co.* v. *Dunnett* [1899] A.C. 428; 16 R. P. C. 411, 413.

This interlocutory observation does not appear in the report in the Law Reports.

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of a trade-mark shall be prima facie evidence of his right to the exclusive use of the trade-mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade-mark, subject to the provisions of this Act." That is the old Act. Here there are these comments in the cases to which I have referred, and there are others which explain the law as it stood in the Act of 1883.

Then the Act of 1905 was passed. It was passed in order that its terms should be more specific than those of the old Act. It appears to me, therefore, that we have now to consider the meaning of the Act of 1905; and although it is true that the Act of 1905 differs from the Act of 1883, it differs in this respect, that it appears to me more specific and to produce in legislative form some of the reasoning, if not the actual words, adopted in the cases decided upon the Act of 1883.

This present application is to remove the trade-mark "Notox" from the register. That application is made under s. 37, which starts by saying: "A registered trade-mark may . . . . be taken off the register in respect of any of the goods for which it is registered," on certain grounds. Now, the grounds on which it can be taken off are these, that it was originally put on "without any bona fide intention to use the same in connexion with such goods, and there has in fact been no bona fide user of the same in connexion therewith." These are two limbs forming one specific ground. An alternative ground for the removal of the mark is given: "Or on the ground that there has been no bona fide user of such trade-mark in connexion with such goods during the five years immediately preceding the application."

In the present case it is admitted that there has been in fact no user of this mark in connexion with goods. What is in controversy is whether or not there was a bona fide intention to use the mark in connexion with goods at the time when it was registered.

I think that in order to understand s. 37 one must turn back to see what a trade-mark is and what it is that is

entitled to be put upon the register. It is perhaps as well to go to that earlier stage before one considers precisely what are the grounds on which the register can be purified or marks expunged from it. Sect. 3 gives a definition of a trade-mark, and it is this: "A 'trade-mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade-mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." It appears to me quite impossible to read that definition without feeling confident that it was contrived after consideration had been given to the words of Lindley L.J. in *In re Batt's Trade Marks* (1), where he said, in the passage I have already quoted—I put it in the affirmative form—that a man must have an intention to deal, and meaning by the intention to deal some definite and present intention to deal, in certain goods or descriptions of goods. I agree that the goods need not be in being at the moment, and that there is futurity indicated in the definition; but the mark is to be a mark which is to be definitely used or in respect of which there is a resolve to use it in the immediate future upon or in connexion with goods. I think that the words "proposed to be used" mean a real intention to use, not a mere problematical intention, not an uncertain or indeterminate possibility, but a resolve or settled purpose which has been reached at the time when the mark is to be registered.

Thus, if I am right in so construing it, and applying *Batt's* case (1), the very definition of a trade-mark means that there must be at the time it is registered a resolve to use it in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade-mark by manufacture, selection, and so on. That is what a trade-mark is. A "registerable trade-mark" means a trade-mark which is capable of registration under the provisions of that Act.

(1) [1898] 2 Ch. 432, 439.

C. A. 1928 — DUCKER'S TRADE MARK, *In re.* — Lord Hanworth M.R.

If one turns, then, to s. 37 and considers what a trade-mark is, it appears that these two alternative grounds which are given for the purposes of the removal from the register have a direct relation to the origin of a trade-mark, its nature, its definition; and it can be taken off on the ground that it was registered without any bona fide intention to use the same in connexion with such goods. What is the meaning of "bona fide"? I think that must mean a real intention in the sense which I have already explained, and if it is not found that there was that real resolve, intention and purpose, then it is established that originally the mark was put upon the register when it ought not to have been put on, because there was not a sincere purpose to make use of the mark in connexion with goods.

If that is the right view it accords precisely with what Tomlin J. has determined. He says (1): "I do not think that there was, at the time of registration, any definite and present intention to use it within *In re Batt's Trade Marks* (2), the language in which is as appropriate to-day as when that case was decided." It appears to me, therefore, that Tomlin J. has reached what, to my mind, is the right construction of both the sections in the Act of 1905, with the consequence that, accepting the facts as found by him, it has been proved to him that there was not, within the meaning of the Act, a bona fide intention to use; and on the second part it is admitted there was non-user up to the date of the application.

That being so, the applicants have made out their case in accordance with the first ground stated in s. 37, and Tomlin J. has come to a right conclusion. For these reasons it appears to me that the appeal must be dismissed with costs.

LAWRENCE L.J. I agree.

SANKEY L.J. I agree.

Appeal dismissed.

Solicitors: *Macdonald & Stacey; Drake, Son & Parton.*

(1) [1928] Ch. 409. (2) [1898] 2 Ch. 432, 439, 440.

W. I. C.

EVE J.
1928
May 11.

In re SUTCLIFFE.

SUTCLIFFE *v.* ROBERTSHAW.

[1927. S. 4286.]

Will—Construction—Settled Share of personal Estate—Death of Tenant for Life without Issue after 1925*—Gift to Persons who would have been entitled as his Next of Kin—Reference to Statutes of Distribution—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 50, *sub-s.* 2.

A testator, by his will, bequeathed a share of his residuary estate upon trust for G. for life, and after his death for his children in equal shares, and in case he died without children upon trust for the person or persons who under the statutes for the distribution of intestate estates would on his decease have been entitled as his next of kin, in case he had then died possessed thereof intestate. The testator died in 1875, and G. died without leaving children in March, 1927:—

Held, that the share was divisible among the persons entitled under the Statutes of Distribution in force at the date of the testator's death, there being no contrary intention expressed in the will to exclude the operation of those statutes, so as to introduce the rules of distribution contained in the Administration of Estates Act, 1925.

ORIGINATING SUMMONS.

The testator, George Edward Sutcliffe, by his will dated January 3, 1872, gave two equal sixth shares in his residuary estate to his trustees upon trust to pay the income to Gamaliel Sutcliffe during his life, and after his death in trust for his children who should attain twenty-one or marry, and should there be no such child, then in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of Gamaliel Sutcliffe have been entitled thereto as his next of kin in case he had then died possessed thereof intestate, such persons, if more than one, to take in the shares in which the same would have been divisible between them under the same statutes.

The testator died on September 14, 1875. The tenant for life died on March 12, 1927, a widower, without ever having had any children.

The summons raised the following questions: (1.) Whether the settled share devolved in and was divisible among the

EVE J.
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persons who would have been entitled to his personal estate if Gamaliel Sutcliffe had died intestate before January 1, 1926, under the original Statute of Distribution (22 & 23 Car. 2, c. 10), or (2.) whether the same was divisible among the persons who would have been entitled to his personal estate under the Administration of Estates Act, 1925, if Gamaliel Sutcliffe had died intestate in respect thereof on or after January 1, 1926, and in the proportions in which such persons would have been so entitled.

By the Administration of Estates Act, 1925, s. 50, sub-s. 2: "Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act."

W. Hunt for the plaintiffs.

J. Beaumont for the defendant Robertshaw. The reference intended by the testator is to the statute for the distribution of intestates' effects in force at the date of the death of Gamaliel, whenever that event might take place. That means the Administration of Estates Act, 1925, by which all other Statutes of Distribution were repealed. The words "in case he had then died possessed" bring the case within the exception contained in sub-s. 2 of s. 50 of the Act, and are sufficient to show a contrary intention to make the statute for the time being in force applicable.

Hurst for three other defendants in the same interest adopted the above argument.

Jenkins K.C. and *W. F. Swords* and *Beebee* for defendants interested as next of kin under the former Statute of Distribution were not called upon.

EVE J. I take the view contrary to that which has been argued by Mr. Beaumont and Mr. Hurst. The testator here

was referring to the Statutes of Distribution which were in force at the time when his will came into operation. I can see no context which would enable me to say that he intended that whatever alterations there were in the law in 1925 should operate to give a different construction to his will from that which he intended to be given when he referred to the Statutes of Distribution. I am not sure what the effect of it is as between the parties, but I think the next of kin are to be ascertained in accordance with the Statutes of Distribution which were in force on September 14, 1875.

Solicitors: *Sheard, Breach & Co., for Marshall, Huntriss & Co., Halifax; Torr & Co., for Eastwoods, Sutcliffes, Sager & Gledhill, Todmorden.*

H. L. L.

In re A DEBTOR.

[27 of 1927.]

Bankruptcy—Receiving Order—Compromise of petitioning Creditor's Action for Debt—Power of Court to go behind Judgment founded on Compromise—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5.

Although, before making a receiving order against a debtor, the Bankruptcy Court has power to go behind a compromise of a petitioning creditor's claim for debt on which a judgment is founded, it will not do so in such a case where the debtor was properly represented by counsel and in the absence of a prima facie case for impeaching the propriety of the compromise.

APPEAL by the debtor from a receiving order made on January 17, 1928, by the Registrar of County Court of Sussex holden at Brighton, sitting in bankruptcy.

The debtor had been sued in the King's Bench Division by an outside firm of stockbrokers for a sum of 700*l.* or thereabouts alleged to be the balance of the price of certain stocks and shares and German marks sold by them to the debtor. The debtor pleaded the Gaming Act, and on the trial of the

ASTBURY and CLAUSON JJ.

1928

A DEBTOR. *In re.*

action on November 27, 1926, the claim was compromised, the debtor, through her counsel, submitting to judgment being entered against her for the sum of 332*l.* 4*s.* 6*d.*, representing the sum of 80*l.* 10*s.*, the balance of 700*l.* after giving credit for 19*l.* 10*s.* paid into Court by the debtor in settlement of the claim, and 251*l.* 14*s.* 6*d.*, the plaintiffs' taxed costs.

The debtor having failed to comply with a bankruptcy notice, served upon her on May 5, 1927, to pay the judgment debt, the judgment creditor on June 10, 1927, presented a petition in bankruptcy against the debtor for a receiving order.

Upon the hearing of the petition the registrar held that a case had been made for going behind the judgment, but that the parties did not intend to gamble on differences, that the transactions were sales of stocks and shares on a system of deferred payment, and that there was good consideration for the judgment submitted to by the debtor on the advice of her counsel, and accordingly a receiving order was made.

Stable for the appellant. "Sufficient cause" exists here for making no receiving order: s. 5, sub-s. 3, of the Bankruptcy Act, 1914. There is sufficient ground here to justify the Court in going behind the compromise and examining the circumstances in which the debt was contracted: *In re Hawkins* (1); see also *Ex parte Lennox*. (2) A broker cannot, without the consent of his client, sell to him his (the brokers) own securities. Here the brokers were employed to buy on the debtor's behalf, but, instead of doing so, they credited to the debtor in their books securities belonging to themselves. The brokers were not entitled to recover from the debtor upon contracts which they were unable to show they had entered into as agents for their client, the debtor. Such a transaction was liable to be set aside at the instance of the client.

The Hon. Edward A. Harney K.C. and *G. F. Kingham* for the respondents.

(1) [1895] 1 Q. B. 404. (2) (1885) 16 Q. B. D. 315.

ASTBURY J. [after stating the facts continued as follows :] In this case the judgment was submitted to by the appellant, the debtor, upon the advice of her counsel, who presumably had full knowledge of the facts which led up to the compromise upon which the judgment was founded. At the trial in the King's Bench Division the appellant was represented by a leading and a junior counsel, and she is now asking this Court, in face of those facts, to go behind the judgment and investigate the circumstances which led up to that compromise. True it is that the Bankruptcy Court may, upon a prima facie case being shown, go behind a judgment for the purpose of satisfying itself that the debt enforceable thereunder was a real debt. But here counsel for the appellant has failed to show anything in the circumstances of the compromise which raises any such suspicion of unfairness or impropriety as to justify this Court in looking behind the judgment to inquire into the consideration for the debt or the propriety of the compromise. The appeal fails, and must be dismissed.

CLAUSON J. I concur.

Solicitors : *Gordon Gardiner, Carpenter & Co., for F. H. Carpenter, Brighton ; W. J. Pitman.*

H. C. H.

TOMLIN J.
1928
July 27.

In re EMERSON.

MORRILL *v.* NUTTY.

[1928. E. 803.]

Will—Codicil—Money—Bequest of ". . . . *the residue of money at the time of my death*"*—Death of Testatrix after January* 1, 1927*—Assimilation of Realty and Personalty—Effect of Bequest on Real Estate—Whether under Administration of Estates Act,* 1925, *word* " *money*" *may include freehold ground rents—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *First Schedule, Part II.*

The testatrix, who died after the coming into force of the Administration of Estates Act, 1925, having made her will, which did not in terms contain any residuary devise or bequest, made a codicil as follows: "I bequeath to my adopted niece D. A. N. the residue of money at the time of my death." At her death the testatrix had no cash in the bank and only a sum of 2*l.* 17*s.* in cash in the house. She owned certain investments, and in addition to a freehold house specifically devised by the will, she was also entitled to two freehold ground rents not devised by the will:—

Held, that on the true construction of the will and codicil the words "residue of money," as used in the codicil, carried the residuary personal estate; and that even though under the Administration of Estates Act, 1925, there is no distinction between real and personal estate for the purpose of paying debts, funeral and testamentary expenses and legacies, the real and personal estate constituting, as it were, one fund for the payment thereof, yet the words used in the codicil could not be said to cover anything more than the residuary personal estate after payment thereout of debts, funeral and testamentary expenses and legacies. Hence the two freehold ground rents must be held to be undisposed of.

ORIGINATING SUMMONS.

By her will dated July 26, 1927, Anne Emerson, spinster (hereinafter called "the testatrix"), gave and bequeathed to her adopted niece Dorothy Annie Nutty her freehold house, "Heathland," 104 Malthouse Road, Crawley, Sussex, and also her furniture, household linen, jewellery and personal belongings not otherwise disposed of by the will. The testatrix gave pecuniary legacies amounting altogether to 250*l.* to three legatees who survived her and specific bequests of furniture etc., to two other legatees; and concluded her will by appointing George E. Morrill, the plaintiff, sole executor thereof, and bequeathing to him for his trouble and expense the sum

of 50*l.* and two articles of furniture, and declaring that she wished all legacies to be free of duty. The said will did not contain in terms any residuary devise or bequest.

On August 14, 1927, the testatrix made a codicil to her will in the following terms—namely, " I bequeath to my adopted niece Dorothy Annie Nutty the residue of money at the time of my death." The testatrix died on October 29, 1927, and her said will and codicil were duly proved by the plaintiff on December 7, 1927, in the Principal Probate Registry.

The testatrix was at the time of her death possessed of the said freehold house " Heathland," which was of the approximate value of 650*l.*, household goods, furniture and personal belongings of the value of 129*l.*, certain stocks and shares, mostly corporation stocks, and banking shares of the total approximate value of 950*l.* ; and certain freehold ground rents secured on Nos. 4 and 6 Kenilworth Road, Ealing, valued at 288*l.* At the date of her death the testatrix had no cash in the bank and only a sum of 2*l.* 17*s.* in cash in the house. The debts and funeral expenses amounted to 124*l.* 12*s.* 3*d.*

An originating summons was taken out on June 13, 1928, by the plaintiff to determine (inter alia) whether under the bequest in the said codicil to the defendant Dorothy Annie Nutty of " the residue of money at the time of my death," the said defendant was entitled to the whole of the residuary real and personal estate of the testatrix, and if not what property of the testatrix passed to the said defendant.

J. V. Nesbitt for the plaintiff, the executor of the will.

G. P. Slade for the defendant Dorothy A. Nutty. The bequest in the codicil passes the whole of the estate of the testatrix, real and personal. It is submitted that although the term " money " used in a will means money in the strict sense, yet the meaning may be given a wider interpretation if justified by the context. Here the testatrix used the words " residue of money," and therefore it is submitted it includes all the personal estate not disposed of : see *Lowe* v. *Thomas* (1), which is distinguishable from the present case ; also *Rogers*

(1) (1854) Kay, 369, 377.

TOMLIN J. 1928 EMERSON, *In re.* MORRILL *v.* NUTTY.

v. *Thomas* (1) and *Dowson* v. *Gaskoin.* (2) It is submitted that the statement in Theobald on Wills, 8th ed., p. 219, is correct and is borne out by these cases. Here the word "residue" is used; and the whole of the personal estate will pass.

That the strict meaning of the word "money" may be departed from is shown by the recent case of *In re Taylor* (3), where the authorities are considered. See further *In re Egan* (4), where the words were "at my death." This would therefore carry all the residue. Also *Prichard* v. *Prichard.* (5)

Another point is as to the date of the death of the testatrix. She died after the coming into force of the Administration of Estates Act, 1925. The law as to real and personal estate has now been changed. By s. 34, sub-s. 3, of that Act, the real and personal estate of a deceased person is applicable in discharge of funeral, testamentary and administration expenses, debts and liabilities, as set out in the First Schedule, Part II., of the Act.

It is submitted therefore that there is now no distinction between realty and personalty, which really form one fund. This really is the same thing as if these ground rents were treated as "residue of money" at the testatrix's death. They therefore would fall within the words in the codicil, and the words "residue of money" would cover them.

W. F. Waite for a defendant Mrs. E. Morse, one of the next of kin and a niece of the testatrix. There is no particular context in the codicil which takes away from the word "money" its strict meaning. The testatrix probably intended by the words to refer to any money in its strict sense not spent by her. The effect of her death after the coming into force of the Administration of Estates Act, 1925, makes no difference.

[TOMLIN J. Are there any cases in which "money" has ever included realty?]

It is submitted, none. On the contrary, see *In re Tribe* (6), a decision of Eve J.

(1) (1837) 2 Keen, 8, 13.
(2) Ibid. 14, 19.
(3) [1923] 1 Ch. 99, 105, 106.
(4) [1899] 1 Ch. 688.
(5) (1870) L. R. 11 Eq. 232, 235.
(6) (1915) 85 L. J. (Ch.) 79.

TOMLIN J. The question before me on this summons is one arising under the will and codicil of a Miss A. Emerson, who died on October 29, 1927. The will is as follows. [His Lordship read the terms of the will as set out above.] On August 14, 1927, the testatrix made a codicil to her will in the following terms: "I bequeath to my adopted niece Dorothy Annie Nutty the residue of money at the time of my death." At her death the testatrix owned a number of investments, such as India Stock, National War Bonds, corporation stocks and other investments of that character. She had apparently 2*l.* 17*s.* in cash in the house, and household goods valued at about 130*l.* She was entitled to a freehold house, being the house in which she lived, and which she had specifically devised; and she was also entitled to the freehold of two other houses in Kenilworth Road, Ealing, which were subject to long leases at ground rents; the value of these two houses, that is to say, of her freehold reversion therein, is stated to be about 288*l.* The total of her estate therefore was just about 2000*l.*, of which some 900*l.* was represented by the house specifically devised, valued at 650*l.*, and by the freehold reversion valued at 288*l.* The legacies, I think, came to somewhere about 300*l.*, and of course there were debts to be paid, and the duty on the legacies, which were given free of duty. In those circumstances I have to determine what she meant when she said in her codicil: "The residue of money at the time of my death." The question of the meaning of "money," a word that seems much in favour with testators, has been frequently considered. The general rules in regard to it are reasonably clear, that is to say, that money without any explanatory context, and taken in its primary sense, cannot carry anything more than cash, and possibly money at call; it cannot cover investments or other items of personal estate, and still less can it cover real estate; that is the general rule. On the other hand, it is admitted that the primary meaning will yield to a context, and the question in all these cases is whether there is some wider meaning which should be attributed to the word by reason of the context, and if so to what extent

TOMLIN J. 1928 EMERSON, *In re.* MORRILL *v.* NUTTY.

that wider meaning goes. It has sometimes been held, in such cases as *Rogers* v. *Thomas* (1), that it is wide enough to carry the whole of the residuary personal estate. On the other hand, it has been held in such cases, as in *In re Taylor* (2), that although not confined to its primary meaning, it has not acquired in the particular context a meaning wide enough to carry all the residuary estate, but only some personal estate of a particular kind.

Looking at this will and codicil, and it seems to me that I am bound to read the will and codicil together, I have no doubt that what she meant in the codicil is this: she meant to give the residue that was left, after provision had been made for those things which at her death became payable by reason of her death, and her testamentary dispositions. In other words, she meant to leave the residue of the fund available for payment of debts, funeral and testamentary expenses, legacies and duties, and if this lady had died prior to that important date, January 1, 1926, I should have had no hesitation in coming to the conclusion that the gift carried all her residuary personal estate.

But Mr. Slade has raised an interesting and novel point. He has said that this lady died after January 1, 1926, and that the administration of her estate is regulated by a new law, the Administration of Estates Act, 1925. Under that new law there is no distinction between real and personal estate for the purpose of paying those matters to which I have referred—namely, debts, funeral and testamentary expenses, legacies and duties—duties are not perhaps quite in the same position, but, at any rate, debts, funeral and testamentary expenses and legacies are—and the real and personal estate constitute one fund, as it were, out of which those things are payable, and therefore the gift here carries not only the residuary personal estate but the real estate as well.

It is quite true that in the times before January 1, 1926, the courts have said that special consideration was shown to the heir, and that you could not take away from the heir except by express words. The heir is no more, but whether

(1) 2 Keen, 8. (2) [1923] 1 Ch. 99.

real estate is now in a better or worse position than personal estate is a matter to be considered. But even under the law as it stands to-day, there is a substantial difference between real estate and personal estate, because, unless I am under a misapprehension, the duties which fall to be paid in respect of the real estate are still duties which are payable out of the real estate itself, and are payable under different terms and conditions from the duties which are payable in respect of the personal estate. It seems to me to be a little difficult to say that, because the real estate has become chargeable with legacies and debts, and notwithstanding that it stands for many purposes, or, at any rate, for the purpose of duty in a different position from the personal estate, it must be treated as simply thrown into a common pot, and that the words which before January 1, 1926, would undoubtedly not carry the undisposed of real estate will do so now. After all the question is, what did she mean by " money," and I see no reason why, because the law has said that the real estate is chargeable with debts and legacies, that should give a meaning to the word " money " different from that which I should otherwise have attributed to it. I am disposed to think that the phrase " residue of money at the time of my death " does mean money, but it means money in this sense, that particular personal property which is left after there has been paid all those things which are properly payable in respect of debts, legacies and funeral and testamentary expenses. I therefore come to the conclusion that on the true construction of this will and codicil, the property which passes is the residuary personal estate, and that so far as the two houses in Kenilworth Road, Ealing, are concerned, they are undisposed of.

Solicitors : *W. E. Singleton ; Gregory Rowcliffe & Co., for Ascroft, Whiteside & Co., Blackpool ; Taylor, Jelf & Co.*

A. R. T.

CLAUSON J.

1928

June 25.

In re FORD.

Ex parte THE TRUSTEE.

RESTALL, BROWN AND CLENNELL'S CASE.

[1297 of 1927.]

Bankruptcy—Order and Disposition—Reputed Ownership—Trade Custom—Furniture Dealer—Goods on "sale or return"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

A trade custom for wholesale dealers in antique furniture to send articles of furniture to retail dealers "upon sale or return" exists, and is sufficiently notorious to exclude such articles from the operation of the doctrine of reputed ownership in the event of the bankruptcy of the retail dealer.

MOTION.

The bankrupt carried on business in Bruton Street, Mayfair, as a dealer in furniture and antiques. Except for the word "antiques" shown inside the shop window, there was no notice to indicate the nature of the business there carried on. The respondents, Restall, Brown & Clennell, Ld., who carried on business as wholesale dealers in antique furniture, had for the past three years been sending their goods to the bankrupt on "approval" or "sale or return." It was the practice between them for the bankrupt to select goods from the respondents' place of business which were conveyed thence to the bankrupt's own shop by the respondents' carman with a "sale or return" invoice of the articles so delivered and their respective prices; and a delivery note was signed and handed to the carman by the bankrupt as a receipt for the goods. It was the practice not to fix any time limit in the invoice; and the bankrupt was at liberty to sell the goods at any price he chose, his only obligation being to pay the price set against each article in the invoice, unless he returned it. The bankrupt was in the habit of paying lump sums from time to time on account of goods he sold and the respondents periodically

checked the goods sent in order to ascertain which of them were sold and made entries of goods sold in their "bought ledger."

On November 29, 1927, a receiving order was made against the bankrupt on his own petition, and on December 22, 1927, an order of adjudication was made. At the date of the receiving order the bankrupt had in his possession goods priced in the aggregate at more than 2000*l.*, which had been so sent to him on "sale or return"; and those goods were at that date exposed for sale in the bankrupt's shop with other goods of the same class, but with nothing to distinguish the goods of the respondents from the rest.

The trustee moved for a declaration that those goods of the respondents were the property of the bankrupt divisible amongst his creditors and vested in the trustee, either on the ground that the property in them was vested in the bankrupt at the commencement of the bankruptcy within the meaning of s. 38 (*a*) of the Bankruptcy Act, 1914, or by virtue of the reputed ownership section of the Bankruptcy Act, 1914.

Evidence was given by furniture dealers of the existence of a well known trade custom for such dealers to dispose of some of their goods in accordance with the course of dealing above described and followed by the respondents and the bankrupt.

Edward Clayton K.C. and *J. Flowers* for the trustee. The goods were vested in the bankrupt at the commencement of the bankruptcy. They were specific goods and according to the intention of the parties the property in them passed to the bankrupt in the circumstances: see ss. 17, 18, r. 4 (*b*), of the Sale of Goods Act, 1893. Alternatively, the goods were in the reputed ownership of the bankrupt: see s. 38 (*c*) of the Bankruptcy Act, 1914. No custom has been proved to exist in the furniture trade to deliver goods to dealers "on sale or return" so as to exclude the operation of that section. In *Livesay* v. *Hood* (1) goods in the hands of a retail dealer on "sale or return" were held to be in the

(1) (1809) 2 Camp. 83.

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possession, order and disposition of the bankrupt with the consent of the true owner and to vest in the bankrupt's assignees under 21 Jac. 1, c. 19 : see also *Ex parte Clarke.* (1) No such custom as that alleged by the respondents was established in *In re Horn.* (2) It is essential to prove such a custom to be notorious amongst traders in general ; it is not sufficient to prove its notoriety only amongst persons who deal in a particular market : *In re Goetz, Jonas & Co.* (3)

Schiller K.C. and *Stable* for the respondents. The question whether the property in the goods passed to the buyers must depend upon the intention of the parties : Sale of Goods Act, 1893, s. 17 ; Chalmers' Sale of Goods, 8th ed., p. 54. Here, the property in the goods never passed to the bankrupt. It is essential that there should be the consent of the true owner to the goods remaining in the debtor's order and disposition : *In re Eslick.* (4) The bankrupt's possession did not make him the reputed owner of the goods, because a well known trade custom has been proved, which excludes the operation of the reputed ownership section : *Ex parte Wingfield.* (5) It is not necessary to show that the custom is known to every creditor, it is enough to show that every person who takes the trouble to acquire any knowledge of the facts on which the reputation of ownership depended must have got to know of the custom : *Ex parte Watkins.* (6)

CLAUSON J. In my opinion, judging from the practice adopted between the respondents and the bankrupt, an intention in fact appears within the meaning of s. 18 of the Sale of Goods Act, 1893—to the exclusion of the rules stated in that section—that the property in the goods should not pass to the bankrupt until sale. Further, I think that proof of the notorious existence of such a trade custom as that which the respondents set up has been established by the evidence tendered before me, with the result that the

(1) (1877) 37 L. T. 509.
(2) (1886) 3 Morr. 51, 56.
(3) [1898] 1 Q. B. 787.
(4) (1876) 4 Ch. D. 496.
(5) (1879) 10 Ch. D. 591.
(6) (1873) L. R. 8 Ch. 520.

goods in dispute were not at the commencement of the bankruptcy in the possession of the bankrupt under such circumstances that he was the reputed owner thereof within the meaning of s. 38 (c) of the Bankruptcy Act, 1914; and so I hold. The motion of the trustee will, consequently, be dismissed.

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Solicitors: *W. Goodwin; Rye & Eyre.*

H. C. H.

In re FORD.

Ex parte THE TRUSTEE.

POWELL'S CASE.

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1928
June 25, 26.

[1297 of 1927.]

Bankruptcy—Order and Disposition—Reputed Ownership—Trade Custom—Furniture Dealer—Delivery of Table by private Customer to Dealer to sell—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

No trade custom exists of private customers sending articles of furniture to retail dealers for sale on commission or otherwise so notorious as to exempt such articles from the operation of the doctrine of reputed ownership in the event of the bankruptcy of the dealer. But, where such a customer left a table with a retail dealer to be sold on the terms that the dealer should retain the surplus, if any, over an agreed minimum price and upon the bankruptcy of the dealer the table was exposed on his premises with other furniture for sale:—

Held, that, as the effect of the custom which was established in the same bankruptcy: *In re Ford, Restall, Brown and Clennell's Case*, reported ante, p. 134, was to prevent the reputation of ownership from attaching to any of the furniture so exposed, the table, which was not distinguished from the other articles of furniture, was not in the bankrupt's possession in such circumstances that he was the reputed owner thereof.

MOTION.

The bankrupt carried on business in Bruton Street, Mayfair, as a dealer in furniture and antiques. Except for the word "antiques" shown inside the shop window there was no notice to indicate the nature of the business there carried on. The respondent, Mrs. E. Powell, being minded to sell her Carlton writing table, in January, 1927, left the table with

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the bankrupt at his shop with instructions to sell the same at a minimum price of 100*l.*, when it was agreed between them that the bankrupt should be at liberty to retain for himself the surplus of any sale moneys which might accrue over and above that amount.

On November 29, 1927, a receiving order was made against the bankrupt on his own petition, and on December 22, 1927, an order of adjudication was made. At the date of the receiving order the table was exposed for sale in company with other articles of furniture in the bankrupt's shop, and there was nothing to distinguish it from those other articles.

This was a motion by the trustee for a declaration that the table formed part of the property of the bankrupt.

Evidence was given to show that the custom, the existence of which was proved in *Restall, Brown & Clennell's Case* (1), was wide enough to embrace goods sent by private customers for sale on commission or otherwise.

J. P. Eddy for the trustee.

Tindale Davis for the respondent. The table is saved from the operation of the reputed ownership section of the Bankruptcy Act by the custom which in *Restall & Co.'s Case* (1), was held to exist between dealers in furniture, in consequence of which all the goods exposed for sale in the bankrupts' shop, including the table and the goods sent by Restall & Co., were excluded from the operation of the section; alternatively, the custom proved in that case embraces the present transaction.

CLAUSON J. The respondent has failed to prove the existence of a general custom in the trade for a dealer such as the bankrupt to hold goods of private customers for sale on commission or otherwise. But the table in dispute is saved from coming within the operation of the reputed ownership clause of the Bankruptcy Act, 1914, upon a different ground—namely, that the existence in the trade of the custom proved before me in *Restall, Brown & Clennell's Case* (1), in the same bankruptcy has the effect of preventing

(1) Reported ante, p. 134.

the reputation of the bankrupt's ownership from attaching to any of the goods whatever exposed in his shop; and accordingly it cannot be predicated of the respondent's table that it was in the bankrupt's possession under such circumstances that the bankrupt was the reputed owner thereof. The motion of the trustee fails, and will be dismissed.

Solicitors: *W. Goodwin; Wordsworth, Marr, Johnson & Shaw.*

H. C. H.

In re PARKES GARAGE (SWADLINCOTE), LIMITED.

Company—Debenture—Validity—Consideration of past Debts—Floating Charge on Company's Property—Invalidated by Winding Up within three Months—Prior Redemption—Validity of Repayment to Trustee for Creditors—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 212.

The effect of s. 212 of the Companies (Consolidation) Act, 1908, is to invalidate a floating charge on the undertaking or property of a company created within three months of the commencement of winding-up proceedings, unless it is proved that the company was solvent immediately after the charge was created, but it does not altogether avoid the debenture. Therefore where such a debenture has been redeemed by payment to the holder before the date of the winding-up petition, the liquidator is not entitled to recover back the money so paid, though he may be at liberty to apply to set aside the debenture as being a fraudulent preference of the creditors whose debts it was given to secure, or on any other ground.

APPEAL from a decision of the judge of the Staffordshire County Court at Burton-on-Trent.

Parkes Garage (Swadlincote), Ld., was incorporated as a private company in January, 1921, for the purpose of taking over and carrying on the existing business of a motor omnibus and garage proprietor and motor dealer. In March, 1927, the company was insolvent, and was being pressed by various creditors. On May 31, 1927, the company's managing director accepted by letter, on behalf of the company, an offer from the Birmingham and Midland Motor Omnibus Company, Ld., for the purchase by the latter company of the goodwill of its motor omnibus business for the sum of

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1800*l*. On June 15, 1927, the company issued a debenture for 1108*l*. 1*s*. 2*d*., carrying interest at 5 per cent., to Oswald Ling, accountant, of Derby, as a trustee for certain selected creditors. The company thereby covenanted to pay such sum with interest on demand or at such earlier date as the principal moneys became payable thereunder in accordance with the conditions indorsed thereon.

Condition 2 was as follows: "The debenture is issued in respect of existing debts from the company, and to secure such debts which are specified below, and may be redeemed at any time on payment of such debts. In the meantime the registered holder is acting as trustee for such creditors." The debts were specified as follows: Alwyn Arthur Andrews, 435*l*.; Kenning & Sons, 283*l*. 10*s*.; American Rubber Manufacturers' Association, Ld., 197*l*. 7*s*. 11*d*.; British Goodrich Rubber Company, Ld., 117*l*. 4*s*.; and C. C. Wakefield & Co., Ld., 74*l*. 19*s*. 3*d*.—total 1108*l*. 1*s*. 2*d*. The charge was to operate as a floating security only, but the company was not to be at liberty to create any mortgage or charge upon the property or assets comprised in the security either in priority to or ranking pari passu with the charge thereby created. By condition 5 the company was entitled at any time after July 1 to redeem the debenture upon giving three months' notice to the debenture holder of its intention so to do. The debenture was duly registered on June 23.

On July 8, 1927, a formal agreement between the company and the Birmingham and Midland Motor Omnibus Company, Ld., was executed, whereby the company sold the goodwill of its motor omnibus business to the Birmingham company for the sum of 1800*l*. A deposit of 180*l*. was paid on the execution of the agreement, and the balance on July 18. The debenture was redeemed in full and a receipt given (the amount being left blank) by Oswald Ling to the company on July 27, the payment being made out of the purchase money paid by the Birmingham company. On September 1 a petition for the winding up of the company was presented in the Staffordshire County Court at Burton-on-Trent by the Midland Bank, Ld., to whom the company was indebted

for an overdraft of 1897*l.* 17*s.* 9*d.* An order was made for the winding up of the company on September 14, and Frederic Norman Parker was appointed liquidator. On May 8, 1928, the solicitor for the liquidator served a notice of motion for a declaration that the debenture issued to Oswald Ling was invalid under s. 212 of the Companies (Consolidation) Act, 1908, and for an order on Ling to repay to the liquidator the sum of 1218*l.* paid to him on July 27, 1927, in purported discharge and satisfaction of the debenture, together with interest and costs and a fee payable to the trustee. The motion was heard on June 13, when the county court judge reserved his judgment, and delivered it later, holding that s. 212 applied to all debentures, whether they had or had not been redeemed, and declaring that the floating charge was invalid. On the further question as to the effect of this declaration he adjourned the hearing to the sitting of the Court at Derby on August 1, with liberty to either party to apply. On August 1, after hearing further arguments, the county court judge found that the debt merged in the debenture, that when the money was paid it was paid to redeem the debenture, and that as he had already declared the debenture to be invalid, the money paid for its redemption must be repaid. He ordered the respondent to pay 1218*l.* to the liquidator.

The debenture holder appealed.

Sir H. H. Slesser K.C. and *T. N. Winning* for the appellant. The effect of s. 212 is to invalidate the charge created by the debenture in the event of a winding up within three months, but it does not discharge or affect the debt. The debt was discharged when the debenture was redeemed, and the payment then made was perfectly valid. The county court judge said that he could not see why a paid debenture holder should be placed in a better position than one whose debt is still outstanding. He held that the simple contract debt merged in the debenture, and was therefore gone.

Clayton K.C. and *Tindale Davis* for the liquidator. The point that there was a distinction between the redemption

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of the charge and the payment in pursuance of the covenant was not taken in the county court, and on that point there is no right of appeal according to the rules of Court: County Courts Act, 1888, s. 120, Order 59, r. 9.

[EVE J. The very fact that the county court judge had only disposed of the first point, as to the validity of the charge, necessitated a second hearing.]

The payment made under the debenture was unlawful. The liquidator could not set up that there had been a fraudulent preference under s. 210; if he had, the answer would have been that the Court must regard what the company believed to be its legal rights. If the debenture holders are paid in good faith there is no "view to prefer."

[MAUGHAM J. How does it matter whether or not there is a merger of the debt in the debenture? The section invalidates only the floating charge. The covenant to pay remains, except in so far as it may be attacked as a fraudulent preference, and that point is not raised.]

The payment was made, not to the creditors, but to the trustee, whose title arose out of the debenture. If the trustee objected to the sale of the company's assets to another company, except upon the terms that the debenture should be paid off out of the proceeds, that would not amount to a fraudulent preference.

The payment was made in pursuance of the charge, and as the charge had no real existence, it was made without consideration. The money therefore remained the property of the company, and ought to be repaid to the liquidator.

EVE J. This is an appeal from an order made by the Staffordshire county court judge, His Honour Judge Proctor, on August 1, 1928. I am constrained to say this: in future this Court will not entertain appeals from county court orders, unless the order appealed against has been completed and an office copy is produced for our inspection. In this case I think the parties are agreed, and the judge's notes disclose that which he did in fact decide, and inasmuch as we are

told it has been the practice elsewhere to determine appeals from the county court without requiring the production of the order, we have not thought it necessary to adjourn the case in order that the order might be drawn up and produced to us.

By his judgment the learned county court judge declared that a certain charge in the nature of a floating security created by the company, in whose name this matter is entitled, was invalid, and that the person in whose favour the charge had been created, and who had been paid all the moneys secured thereby, was bound to repay the moneys so paid to him.

The facts are not in dispute. The company was insolvent continuously from March 1, 1927. It owed a considerable sum of money to creditors, and in the months of May and June half a dozen creditors were pressing for payment of their debts. Some of them went so far as to issue writs against the company, and in those circumstances the ultimate fate of the company was inevitable, unless something was done to satisfy these creditors. Fortunately for the company and these particular creditors, on June 15 a contract was entered into for the sale of part of the company's business, for a sum which would put the company in funds sufficient to pay the half dozen pressing creditors. On the same day as the contract of sale was entered into a debenture was executed by the company in favour of a Mr. Oswald Ling, an accountant, who throughout has acted as trustee for the half dozen pressing creditors—a debenture by which the company covenanted with him on demand to pay the principal moneys thereby secured in accordance with certain conditions indorsed thereon, and in the meantime to pay interest on the dates therein specified. By clause 3 of the debenture the company, as beneficial owner, thereby charged with such payments its undertaking and all its property and assets whatsoever and wheresoever both present and future. The money was in due course received from the purchasing company, and on July 27 it was applied not only in paying the principal and interest secured by the covenant

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in the debenture—that is the debts due to the pressing creditors with interest from the date of the debenture—but also in paying the costs which they had incurred prior to the execution of the debenture, and a fee of 21*l.* to the trustee. Thereupon the trustee indorsed on the debenture a receipt, which reads in these terms: "Received the sum of £ (blank) in full satisfaction and discharge of the before written debenture." The actual sum is not inserted, nor is it proved before us what really was paid. There is a difference in the amounts stated in the two affidavits, but the exact sum is not material on this appeal.

The Midland Bank, who were large creditors for advances made to the company, having heard of this transaction and having had no part of their debt repaid, on September 1 presented a petition for the winding up of the company, and on the 14th of that month an order for winding up was made. Thereupon the liquidator issued a summons seeking to set aside the charge contained in the debenture, and to recover from the debenture holder the amount, whatever it was, which had been paid to him on July 27. The summons was launched, and the case conducted on the footing that the applicant was entitled to that relief under s. 212 of the Act of 1908. So far as it is material that section reads: "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid."

Having regard to the facts which I have stated, about which there is no dispute, it is quite obvious that the learned county court judge had no option but to declare the charge to be invalid, and he so did. That part of his judgment, however, was not of much practical importance, because the charge had been satisfied by the payments which had been made, and it was then argued that the declaration of invalidity involved the further question: whether the debenture was still subsisting for any purpose, and if so were the simple

contract debts, to secure which it had been issued, merged in the covenant contained in the debenture. An argument on those lines was addressed to the learned judge, at the conclusion of which he held that the simple contract debts were merged, and forgetting for the moment the limited extent to which he had declared the debenture invalid, he referred to the whole debenture as invalid, and held that the simple contract debts having been merged, and the debenture being invalid, the creditors were not entitled to retain the money paid to them through their trustee on July 27.

At the first hearing the learned judge had not declared, nor could he declare the debenture invalid; all he could declare invalid was the charge therein contained. The rest of the document, the covenants to pay principal and interest, survived and was valid, for nothing in s. 212 affects them. The position therefore was that the simple contract creditors, by their trustee, who was the covenantee, were entitled to the benefit of the covenants to pay principal and interest, and on July 27, when the company was in sufficient funds to pay the principal and interest, they had no alternative but to pay the same, and the trustee cannot on this summons be ordered to repay. But having regard to what has been disclosed in these proceedings, that the company was hopelessly insolvent from the beginning of March down to the date of the winding-up order, and that the effect of the payments to these half dozen creditors on July 27 was to apply the whole available assets of the company to the payment of their debts in full and to leave other creditors whose debts largely exceeded the aggregate amount paid to the half dozen unprovided for, raises a doubt whether the whole transaction, which culminated in the payments on July 27, was not in the nature of a fraudulent preference. We desire therefore to give the liquidator an opportunity of considering the position from this standpoint, and in allowing this appeal to state that the order is without prejudice to any application to set aside the payments or to question the validity of the debenture on the ground of its being a fraudulent preference or on any other grounds which

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the liquidator may think fit to advance. The respondent will pay the costs here and below.

MAUGHAM J. I agree.

Appeal allowed.

Solicitors: *Pattinson & Brewer, for Flint, Marsden & Bishop, Derby; George Thatcher & Sons, for A. H. Timms, Swadlincote.*

H. L. L.

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Oct. 22.

In re FORSTER.

SOMERVILLE *v.* OLDHAM.

[1928. F. 686.]

Law of Property—Vesting of Legal Estate—Settlement—Legal Estate Outstanding in Personal Representatives of Settlor—Right of Settlement Trustees to call for Legal Estate—Settlement Beneficiaries entitled in Undivided Shares—Personal Representatives Trustees for Sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I, Part II., paras.* 3, 6 (*b*); *Part IV., para.* 1, *sub-para.* 1 (*b*).

Immediately before the commencement of the Law of Property Act, 1925, the legal estate in land was outstanding in the personal representatives of the settlor and held upon the trusts of a marriage settlement which, in the events which had then happened, were for two daughters of the settlor in undivided shares absolutely:—

Held, that, as the personal representatives then held the land in trust for the daughters in undivided shares vested in possession, they held it, after the Act came into force, upon the statutory trusts, by virtue of Sch. I., Part IV., para. 1, sub-para. 1 (*b*), of the Act, with the result that the settlement trustees were not entitled, as, but for Part IV., they would be, to call for a conveyance of the legal estate; but the personal representatives held the land on trust for sale and were entitled to sell the same, unless the daughters elected to call for a conveyance.

ADJOURNED SUMMONS.

By the settlement, dated August 11, 1890, made on the marriage of Harry Helden Forster (hereinafter called "the husband"), and Harriett Eliza Oldfield (hereinafter called "the settlor"), after reciting that the settlor was possessed of or entitled to certain freehold houses and plots of land at Islington, described in the schedule thereto, and that,

with a view to the settlement thereof, the settlor had agreed that all her interest in the land should be transferred into the names of or otherwise made to vest in the trustees of the settlement; it was agreed that the trustees should stand possessed of the land in trust to pay to the settlor the income of the land during the joint lives of her husband and herself, and after the death of such one of them as should first die, pay the income to the survivor of them during his or her life; but, as to the husband, for his life or until he should marry again: And from and after the death of the survivor should stand possessed of the land and the income thereof in trust for all or such one or more exclusively of the others or other of the children of the marriage at such age or time and if more than one in such shares and generally in such manner in all respects as, in default of a joint appointment which happened, the settlor should by will appoint and in default of any such appointment, in trust for the children of the marriage.

The settlor died on December 22, 1915, without ever having conveyed the land to the trustees of the settlement and leaving her husband and six children surviving her. She had made her will in May, 1915, whereby she appointed executors (who proved the will in 1926), and devised and bequeathed two-thirds of her real and personal estate, subject to her husband's interest under her marriage settlement in trust for her daughter Dorothy (afterwards Mrs. Gray) and one-third to her daughter Winnifred (afterwards Mrs. Somerville), without power of anticipation.

On September 29, 1923, the husband married again.

Upon a summons taken out by Mrs. Somerville raising questions whether, upon the proper construction of her will, the settlor effectually exercised her power of appointment; and, if she did, whether her two daughters named in the will took the land absolutely in the shares therein mentioned. Clauson J. held that the will was an effectual exercise of the power of appointment and that the two daughters were absolutely entitled to the property in the shares aforesaid. The third question raised for the determination of the Court

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was whether, in the events which had happened, the property was vested (*a*) in the trustees of the settlement, or (*b*) in the personal representatives of the settlor, or (*c*) in the two daughters as joint tenants and whether in any case upon the statutory trusts.

E. J. Heckscher for the plaintiff.

G. D. Johnston for the settlement trustees and personal representatives of the settlor, referred the Court to Sch. I. of the Law of Property Act, 1925, Part II., paras. 3, 6 (*b*); Part IV., para. 1, sub-para. 1 (*b*), and to *In re Dawson's Settled Estates.* (1)

Buckmaster for Mrs. Dorothy Gray.

F. J. Newman for three sons of the settlor.

CLAUSON J. [after stating the facts, continued:] For the purpose of answering the third question raised by the summons it becomes necessary to examine the transitional provisions contained in the First Schedule to the Law of Property Act, 1925. It is to be observed that the marriage settlement only contained the trusts upon which it was thereby agreed between the parties, the husband and wife and the trustees, that the real property in question should be held and contained no legal conveyance of the property by the settlor to the trustees, nor has there been any conveyance to them by any other instrument. At the time of her death, which occurred before the Law of Property Act, 1925, came into force, the settlor retained the legal estate in the property upon the trusts declared by the settlement; and the position then was that the trustees of the settlement were entitled to call upon the settlor's personal representatives, in whom the legal estate was thus outstanding, to execute a conveyance of the property to them. But they never exercised that right. Before the Law of Property Act, 1925, came into force, owing to the will of the settlor, which I have already held was an effectual exercise of the power of appointment which she possessed under the settlement, and the cesser of

(1) [1928] Ch. 421.

her husband's interest in the income, the settled property in equity belonged absolutely as to two-thirds to Mrs. Gray and as to one-third to her sister the plaintiff, as I have already held.

The question then is how has that position been affected by the new legislation? Turning to the transitional provisions contained in the First Schedule to the Law of Property Act, 1925, para. 3 of Part II., I find that: "Where immediately after the commencement of this Act any person is entitled, ... to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in . . . . him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided." Then para. 6 provides for the vesting of the legal estate which a person is entitled to require to be vested in him and (*b*) "Where the land is at the commencement or by virtue of this Act . . . . subject to a trust for sale, the legal estate affected shall vest in the trustees for sale (including personal representatives holding land on trust for sale)." Stopping there and subject to any provision in Part IV., it would be true to say that, after the Act, the settlement trustees would be entitled, as they were before the Act, to require the personal representatives of the settlor to convey to them the legal estate, unless the Act has made those personal representatives trustees for sale.

I now turn to Part IV. of the Schedule which provides as follows: para. 1: "Where immediately before the commencement of this Act, land is held . . . . in equity in undivided shares vested in possession." Sub-para. 1: "If the entirety of the land is vestedi n trustees or personal representatives . . . . in trust for persons entitled in undivided shares then (*b*) the land shall be held by such trustees or personal representatives upon the statutory trusts," which by virtue of s. 35 of the Act has the effect of making them trustees for sale. If it be true to say (as in fact it is) that immediately before the commencement of the Act, the personal representatives held the entirety of the land in trust for persons entitled in undivided shares—and I read into sub-para. 1 the words "immediately before the commencement of this Act" as qualifying the words "vested

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in trustees or personal representatives "—then, after the Act came into force, the land being thus held by personal representatives upon trust for sale, the case would not fall within the provisions of the First Schedule, Part II., para. 3. If, after the Act came into force, the settlement trustees required the personal representatives to convey the land to them, the latter would be entitled to refuse to do so, on the ground that they might have been required to convey before the Act, but not after the Act had made them trustees for sale. There will be a declaration that the real estate in question is now vested in the personal representatives of the settlor upon the statutory trusts. The result of that will be that they may sell the property if the two ladies do not elect to call (as they are entitled to do) for a conveyance of the property to themselves as joint tenants upon the statutory trusts.

Solicitors: *De La Chapelle, Thirlby & Co.; T. W. Hall & Sons; Faithfull, Owen, Blair & Wright; P. B. Akerman.*

H. C. H.

In re WINDSOR STEAM COAL COMPANY (1901), LIMITED.

C. A. 1928 Oct. 16, 17.

[00124 of 1927.]

Company—Voluntary Winding Up—Misfeasance of Liquidator—No Wilful Default—Payment in Settlement of Invalid Claim—Liquidator's Liability to make good—Trustee or Agent—Claim to Indemnity—"Loss"—Negligence—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 30, *sub-s.* 1; *s.* 61.

The indemnity conferred on trustees by the Trustee Act, 1925, s. 30, sub-s. 1, does not apply where a trustee, even though as the result of an honest mistake, has misapplied trust funds by paying them to the wrong person.

The selling agents of a colliery company, which had sold its undertaking and was being voluntarily wound up, claimed 19,088*l.* damages for alleged breach by the company of the agency agreements. There had in fact, as the Court held, been no breach of the agreements. The liquidator consulted the solicitors of a large shareholder, who was opposed to the claim, and they said they had advised their client that there was a valid claim but that the amount of damages was uncertain. Without taking further advice or obtaining the opinion of the Court (a course the liquidator had recognized to be open to him) the liquidator settled the claim for 15,000*l.* A summons was taken out by a contributory to obtain repayment of this sum to the company, on the ground that the liquidator had been guilty of misfeasance, and the liquidator, whose bona fides was not in question, claimed the benefit of the indemnity given to trustees by the Trustee Act, 1925, s. 30. On an appeal from Maugham J., who had held that the liquidator was not a trustee within the meaning of the Act:—

Held (without deciding whether the liquidator was a trustee within the meaning of the Act), that, even if he were: (1.) he was not entitled to indemnity under s. 30, sub-s. 1, because that sub-section did not extend to a case where a trustee had misapplied trust funds coming to his hands; and (2.) he was not, on the facts, entitled to relief under s. 61; and, further, that, if he was an agent of the company and not a trustee, he was liable for his misfeasance as agent, as he had been guilty of negligence.

Per Lawrence L.J.: Even if a liquidator is a trustee within the meaning of the Trustee Act, 1925, he is, as a paid trustee, disentitled to relief under s. 61: *National Trustees Co. of Australasia*, v. *General Finance Co. of Australasia* [1905] A. C. 373 applied.

Decision of Maugham J. [1928] Ch. 609 affirmed, but, in part, on different grounds.

APPEAL from a decision of Maugham J. (1)

By an agency agreement dated April 12, 1900, and made between the persons then constituting the firm of George Insole & Son of the one part and the Windsor Steam Coal

(1) [1928] Ch. 609.

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Company, Ld., of the other part, after recitals stating that the company were the lessees of certain collieries and that it had been agreed that the coal raised by the company from these collieries should be sold and shipped by the firm, their successors and assigns for the time and upon the terms thereinafter mentioned, it was provided (clause 1) that the firm "are hereby appointed for the term of 21 years next ensuing the sinking of the company's pits . . . . to be sole sellers and shippers of the entire output of the said Windsor Collieries"; and (clause 8) that the company should pay the firm "as remuneration for their services upon the coal raised and sold and on the coal raised and coked in each year the sum of 3*d.* per ton up to 200,000 tons and upon the balance the sum of 2*d.* per ton."

In 1901 there was a reconstruction, as the result of which the Windsor Steam Coal Company (1901), Ld., was incorporated to take over the business of the old company. On October 16, 1919, a further agreement was entered into by the persons then constituting the firm and the new company by which it was provided that the appointment of the firm to be "sole sellers and shippers of the entire output of the said Windsor Collieries shall after the expiration of the period mentioned in the principal agreement be continued and extended for the further term of 21 years computed from the date of this agreement," and should thereafter continue until determined by the company by twelve calendar months' notice in writing.

The company having ceased for some years to carry on business at a profit entered into a contract on May 27, 1925, for the sale of its undertaking to another colliery company, and on January 1, 1926, the company went into voluntary liquidation and the appellant Richard Henry March, a chartered accountant, appointed to be the liquidator.

The firm asserted that the company had committed a breach of contract by selling their undertaking without providing for their continued employment as selling agents, their contention being that under the agreements the company had contracted for their employment as selling agents for a

fixed period of the output of the Windsor Collieries, irrespective of whether the coal was raised by the company or some other colliery company. They therefore claimed in the winding up 19,088*l.* damages in respect of the commission which they had failed to earn. The question whether the claim should be admitted concerned only the 10 per cent. preference shareholders of the company, as the assets would in any case be insufficient to pay any dividend to the other shareholders. The liquidator and Sir Walter Nicholas were executors of a Mr. Matthias, who had been a large holder of 10 per cent. preference shares, and Sir Walter Nicholas, who was a member of the firm of solicitors, Messrs. Morgan, Bruce & Nicholas, expressed at the outset strong views against the claim. On January 27, 1926, the liquidator wrote to these solicitors sending them a copy of the firm's written claim, and after discussing the amount of the claim, said that he was inclined to offer to accept the claim at 15,000*l.*, but before dealing with it "I should like to have your views, firstly, as to whether the selling agents have a claim at all and, secondly, as to how that claim should be assessed." On February 2, 1926, the solicitors replied saying that they had discussed the matter with their client, Sir Walter Nicholas, and advised him "that there is no doubt that the selling agents have a claim in the winding up of the company in respect of the cancellation of their agreement. With regard to the amount of damages to which they may be entitled, this is another matter, as unless the company had been fortunate enough to effect a sale . . . . it is extremely unlikely that they would have survived for the unexpired term of the agreement. However we are quite prepared to leave the question as to the amount of damages in your hands for settlement."

Thereupon the liquidator, without taking further advice of any kind or referring the matter to a general meeting of the shareholders, wrote to the firm on February 8, 1926, confirming his offer, made that day at an interview, to pay the sum of 15,000*l.* in settlement of their claim. This was accepted by a letter dated February 10, 1926, and the sum of 15,000*l.* paid in July, 1926.

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This summons was taken out by one of the 10 per cent. preference shareholders as a contributory to the company asking for a declaration that the liquidator's payment of the sum of 15,000*l.* to the firm was a misapplication of the money of the company and that the liquidator had been guilty of a misfeasance and breach of trust in relation to the company; and they asked for repayment of this sum.

At the hearing before Maugham J. the liquidator admitted in cross-examination that he had discussed the claim with another holder of 10 per cent. preference shares, who he said "was dead against it," and he added: "I think every 10 per cent. preference shareholder would have been against it." The liquidator also said that he had considered the propriety of applying to the Court, and continued: "I was not in any difficulty about the matter, because I had got this very definite opinion of Sir Walter Nicholas. Had I been in any difficulty, I should certainly have applied to the Court." He also said that he saw no good in submitting the matter to a general meeting of the company, because at such a meeting the 10 per cent. preference shareholders would not have been entitled to vote.

According to the decision of Maugham J., which was affirmed by the Court of Appeal, the company had upon the construction of the agency agreements committed no breach and the firm were entitled to no damages. The case is not reported on this part of the decision.

It was admitted that the liquidator had acted honestly in the matter, and at the trial he claimed to be protected by s. 30 of the Trustee Act, 1925, from any liability to repay the money.

Maugham J. held that a voluntary liquidator of a company was not a trustee within the meaning of the Trustee Act, 1925, and was, therefore, not entitled to the indemnity given to trustees by s. 30 of the Act.

The liquidator appealed. The appeal came on for hearing on October 16, 1928.

Topham K.C. and *R. J. T. Gibson* for the appellant. The liquidator ought not to be made liable to refund this sum of

15,000*l*. The present application is made under the Companies (Consolidation) Act, 1908, s. 215, but that section did not create any new offence but merely provides a summary procedure where, apart from the section, an offence exists. It is a procedure section only: *In re City Equitable Fire Insurance Co.* (1)

[LAWRENCE L.J. The section provided a new remedy, so as to avoid the necessity of resorting to an action to make the liquidator account. In an action for account the liquidator could not have discharged himself from liability for money misapplied by him.]

On the action for an account, the liquidator could only be made liable for sums misapplied on the footing that he was a trustee. The company's agent could only be made liable if he had been guilty of negligence. Here the liquidator consulted Messrs. Morgan, Bruce & Nicholas, who were acting for a member hostile to the claim; and the liquidator acted on the basis of the view they expressed that the firm had a valid claim. There is no ground for saying he was negligent. The liquidator is very much in the position of a director. On a winding up he takes the place of the directors and carries on the business of the company for the purpose of winding it up: *In re Anglo-Moravian Hungarian Junction Ry. Co.* (2) The liquidator is therefore in the position of a trustee, and the property of the company trust property: *In re Oriental Inland Steam Co.* (3) That case was discussed in *Knowles* v. *Scott* (4), where it was held that the liquidator was not a trustee for the contributories so as to enable a single contributory to proceed against him on that footing. As the positions of liquidator and director are so analogous, it becomes important to see what is said about directors. It has been clearly held that directors of a company are trustees of money of the company coming to their hands within the meaning of the Trustee Act, 1888, s. 1, sub-s. 3: *In re Lands Allotment Co.* (5) The definition of trustee in

(1) [1925] Ch. 407, 527.
(2) (1875) 1 Ch. D. 130, 134.
(3) (1874) L. R. 9 Ch. 557, 559, 560.
(4) [1891] 1 Ch. 717.
(5) [1894] 1 Ch. 616, 630.

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that Act resembles closely that in the Trustee Act, 1925, s. 68, sub-s. 17. It follows that the liquidator is a trustee within the meaning of the Act of 1925 and, if so, he ought to be relieved by the Court under s. 61 on the ground that he "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach." The Court has a discretion in the matter, but it is submitted that this is a case coming fairly within the section and that he ought to be relieved. Further, it is contended that he has a right of indemnity under s. 30 of the Act. It provides that a trustee shall not be liable for the acts of any other trustee or of any banker, broker or other persons or for the insufficiency of any securities "nor for any other loss, unless the same happens through his own wilful default." It is those last words that are relied on here.

[RUSSELL L.J. There has been no loss within the meaning of the section, but a misapplication of funds coming to the liquidator's hands.]

It has resulted in a loss to the fund: compare *In re Munton*. (1)

[LORD HANWORTH M.R. That was a very different case. Here the fund was not lost. The liquidator received it, and having received it paid it away to the wrong person.

LAWRENCE L.J. Has there ever been a case where a trustee called upon to account has under this section escaped liability to make good money actually misapplied by him?]

It is contended that s. 30 covers every case in which there has been a loss by the act of the trustee.

Alternatively, if the view is that the liquidator is not a trustee but a mere agent for the company, he can only be made liable if he has been guilty of negligence; and it is submitted that no such case can be made out here.

Lastly, the liquidator ought not in any case to be made liable for the whole 15,000*l*. until it is seen whether any part of it can be recovered under s. 193 of the Companies

(1) [1927] 1 Ch. 262.

(Consolidation) Act, 1908. Further, if the liquidator had gone to the Court or to the shareholders in general meeting to sanction a compromise of the firm's claim, some compromise would probably have been sanctioned, even though at a less amount than 15,000*l.* The liquidator, on this ground also, ought not to be made liable for the whole.

Gavin Simonds K.C. and *Lionel Cohen* for the respondent. There was no sufficient justification for paying away 15,000*l.* against the wishes of the shareholders interested. His proper course was to apply to the Court under s. 193 of the Act of 1908 or under s. 214 to have a compromise of the claim sanctioned. Instead of this, the liquidator took the reckless course of making this large payment without taking the advice of the company's solicitors or of counsel. This is not the standard of conduct to be expected from a liquidator, and the liquidator ought to be made to refund the money.

It is contended that even if he is liable to account as a trustee he is entitled to the benefit of ss. 30 and 61. It is unnecessary to argue the question whether he is a trustee within the meaning of the Trustee Act, 1925, for even if he is, he is not entitled to relief under s. 61, and s. 30 clearly does not apply. The liquidator, if a trustee, is a paid trustee, and the Court will not give relief to a paid trustee under s. 61 : *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia.* (1)

Then it is said (alternatively) that the liquidator is not a trustee but an agent of the company, and liable therefore only for negligence. These analogies are dangerous. The liquidator is more than an agent, for he has statutory duties to perform. But even if his only liability were to act as a business man with reasonable care and skill, he has fallen short of that standard and recklessly made this payment.

[They were stopped.]

Topham K.C. in reply. The liquidator wrote to the very persons most likely to advise against the firm's claim, and they said that there was no doubt about it. In these circumstances he cannot be said to have acted negligently.

(1) [1905] A. C. 373, 381.

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LORD HANWORTH M.R. This is an appeal from a decision of Maugham J. in a matter which is very serious to the appellant, Mr. March. I think it just to him that I should at the outset say in clear and unmistakable language that there is no charge made against his bona fides and no charge made against his professional or personal honour. Mr. Gavin Simonds has made it quite clear that he makes no such charge; and Mr. March is entitled to have it made plain to all who may take an interest in this case that no charge of any kind is made against him. I say that at the outset of the judgment, because I can well understand that the result of our decision, serious as it must in any case be to Mr. March, might otherwise be considered by persons who did not fully appreciate the facts to be personally derogatory to him.

The case has been very carefully considered by Maugham J., and but for my appreciation of the argument which has been addressed to us by Mr. Topham and Mr. Gibson I would be content to accept his judgment and to say that I agree with him. I think, however, that it is right that I should deal with the matter afresh. [His Lordship then stated the facts.]

Under s. 214 of the Companies (Consolidation) Act, 1908: "The liquidator may . . . . in the case of a voluntary winding up, with the sanction of an extraordinary resolution of the company, ... make any compromise or arrangement with creditors or persons claiming to be creditors." It is quite clear that Mr. March, a professional gentleman—I have no doubt he had been a liquidator on many other occasions—knew perfectly well that he could go to the Court; and his counsel says that he did not compromise the firm's claim, because he knew that, if he had compromised it, it would have been necessary for him to obtain an extraordinary resolution of the company sanctioning the compromise; and he was disinclined to put the success of this compromise to the touch of a decision at a meeting of the company. Instead of adopting either of these courses he determines to pay a sum of 15,000*l.* in settlement of the claim, and ultimately he pays it.

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Now it is quite true that the Court ought to be very tender with persons who are placed in the difficult positions of directors or liquidators, and should not judge their conduct in the light of subsequent events. I agree with the proposition of Romer J. in the *City Equitable* case (1) in which, summarizing various authorities, he says: "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician." We are speaking here not of a director, but of a liquidator. But let me apply the good sense which underlies those observations of Romer J. to the present case. One does not wish to attribute to a liquidator the knowledge or the experience of the lawyer, but I think that one may reasonably ask from him the exercise of some common sense and judgment when he is placed in a difficulty. The difficulty in which Mr. March was placed was this. One set of persons interested in the company were wholly opposed to his making any payment at all to the firm. Another body of opinion—I refer to Messrs. Morgan, Bruce & Nicholas, and, for this purpose, couple Sir Walter Nicholas' acquiescence, if that can be inferred from their letter of February 2, 1926—was agreeable to something being paid, but doubtful as to the quantum; and none had agreed on what should be the quantum. In those circumstances, Mr. March, having the opportunity of safeguarding himself either by going to the Court or by securing an extraordinary resolution passed by the company in general meeting sanctioning a compromise, takes neither of those courses, but himself assumes the responsibility and agrees to pay 15,000*l.* A liquidator is a person who is charged with a number of statutory duties under the Companies Acts. At the same time those Acts afford him the opportunity of going to the Court to obtain protection in any difficult circumstances in which he may be placed. The facts of this case are that Mr. March, declining to accept the delay that might have been involved in going

(1) [1925] Ch. 407, 428.

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to the Court, declining to risk what would happen at a general meeting, acted entirely on his own judgment, and determined to make this payment, and made it was. After that, objection being taken by originating summons, proceedings have been brought to make Mr. March liable for what he has done bona fide but—perhaps it would not be unfair to say—with headstrong determination.

The case made against Mr. March is that having acted upon his own responsibility at a time when he need not have done so, he has in fact misapplied moneys of the company's which ought never to have been used for the purposes to which they were applied; and the powers of s. 215 of the Companies (Consolidation) Act, 1908, are invoked against him. I accept the view that s. 215 gives no new rights, but it provides a summary remedy which was first given by the Companies Act, 1862. It is said then against Mr. March that he has misapplied money of the company, and paid away money to persons having no right to receive it. It becomes necessary therefore to consider whether or not the firm Insole had a valid claim against the company. [His Lordship then decided that on the true construction of the agency agreements they had no valid claim.] If that be so, the sum of 15,000*l.* paid to the firm by way of compensation ought never to have been paid to them. Mr. Topham said that, even if there was no valid claim, yet this might be a case in which the Court would have held that there was a doubt and that it was a case in which a compromise might legitimately have been made at a much lower figure; and he contended, therefore, that to charge the total sum of 15,000*l.* against Mr. March was to overlook the possible event that to avoid litigation a compromise might have been sanctioned by the Court or by resolution of the shareholders at a smaller figure. The answer which prevents my adopting that view is that none of those contingencies have happened. Mr. March has taken on himself to pay the sum of 15,000*l.* away without seeking to compromise at a reduced figure; and he has made it impossible to deal with the matter on the basis suggested. It is not a question of his having formed

a judgment as to the amount at which the claim ought to be compromised not differing greatly from what would have been allowed by the shareholders or by the Court.

It appears to me that Mr. March has in fact applied money without caution to the liquidation of a claim which ought never to have been made and which was not sustainable by the firm, and that thus he has brought himself within s. 215 of the Companies (Consolidation) Act, 1908.

Then it is said that he is entitled to rely upon the Trustee Act, 1925. I do not think it necessary to decide whether he was a trustee of this money. Let me assume that he was, and no doubt a liquidator may, from some points of view, be treated as a trustee just as a director may be treated as a trustee. Even so, what assistance can he obtain from s. 61 of the Trustee Act, 1925? The section says: "If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him." Assuming Mr. March to have been a trustee, he does not in my opinion fulfil the terms of that section at all. Can it be said that he acted not only honestly, as indeed he did, but reasonably? Is he a person who "ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach?" He wilfully omitted to obtain the directions of the Court; and it appears to me that the terms of s. 61 cannot apply, because the facts are widely different from those that would justify the Court in giving relief under that section. Equally it appears to me that s. 30, for reasons which we have given in the course of the argument, does not apply. It appears, therefore, that there is no answer to this claim made against Mr. March for having misapplied the 15,000*l.*, by paying it

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in respect of a claim which was not a valid claim against the company.

Lastly, it is said that if Mr. March is not a trustee, he may be considered as the agent of the company, and that as the agent he would not be liable unless he had been guilty of negligence. I do not know how far this point was taken or discussed before Maugham J., but if it be necessary (and I by no means accept that view) to say that as an agent he had been guilty of negligence, I should be prepared to say at once that he had been so guilty, and for this reason. If negligence is an element which must be found against him —which I do not assent to—I think that an agent who had to deal with so large a claim as 19,000*l.* when possessed of only small assets would be guilty of negligence if, when he had to his hand two methods of obtaining protection—by a meeting of the shareholders or by an application to the Court—he refuses to avail himself of either of those safeguards and acts on his own with a speed which certainly shows no long consideration. I think it can fairly be said against him that he was negligent in respect of the business of his principal which was entrusted to him.

On all these grounds it appears to me, therefore, that Mr. March has failed to show any ground for disturbing the judgment of Maugham J., and in my judgment this appeal must be dismissed with costs.

LAWRENCE L.J. The first question which falls to be determined on this appeal is as to the true scope and effect of the agency agreements. [His Lordship then decided that on the construction of these agreements, the firm had no valid claim against the company for damages.]

The next and only other question which arises is whether the appellant is liable for having paid the large sum of 15,000*l.* to the claimants in respect of the claim which they made against the company. In determining that question there are certain facts which it is essential to bear in mind. The appellant, who was appointed liquidator of the company, was a chartered accountant skilled and versed in the performance of the

duties of such an office, and it was part of his business to act in that capacity for remuneration and for profit to himself. The appellant had, as appears from his letter of January 27, 1926, realized that there might be a doubt, first, whether the claimants had any claim against the company, and, secondly, if they had, at what amount such claim ought to be assessed. In the next place it appears from the appellant's evidence that he knew that the preference shareholders of the company, who were the only persons interested in resisting the claim, were opposed to any payment being made to the claimants. It further appears from that evidence that the appellant purposely abstained from endeavouring to obtain either an order of the Court or an extraordinary resolution of the shareholders sanctioning the payment. As regards obtaining a resolution of shareholders, I am inclined to agree that such a course would have been practically useless, because the preference shareholders would not have been entitled to vote at the meeting, and, therefore, the resolution would have been a resolution of a class of shareholders who, in the circumstances, had no interest in the matter one way or the other. But this fact, to my mind, made it all the more important that the appellant should have taken the course of applying to the Court. However, for reasons which he considered sufficient, the appellant took upon himself the burden of deciding on the validity of the claim ; and in so doing, in my judgment, he also took upon himself the risk of its turning out that such a payment was a misapplication of the funds under his control.

It is said that the payment ought not to involve the appellant in any liability, because he was in the position of an ordinary agent and the payment was not negligently made, and alternatively because he was in the position of a trustee, and ought to be excused for any breach of trust that he may have committed under the provisions of the Trustee Act, 1925. Dealing with the latter alternative first, I am content, without deciding the question, to treat the appellant as being in the position of a trustee whose duty it was to distribute a trust fund in his possession or under

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his control. As such trustee it was his duty to pay the debts of the company and to divide the balance of the fund amongst the preference shareholders. It is contended that having made the payment to the claimants honestly (which is fully conceded) he ought to be excused from having to replace the money he has paid to the claimants, and in support of that contention Mr. Topham relied first upon s. 61 of the Trustee Act, 1925, and, secondly, upon s. 30.

Under s. 61 of the Trustee Act, 1925, three conditions must be complied with before the Court will excuse a trustee who has committed a breach of trust by making a payment to the wrong person. First, the payment must have been made honestly; secondly, the payment must have been made reasonably; and thirdly, the trustee must show that he ought fairly to be excused for having made the payment. In the present case the payment was one made by a trustee on the assumption that he was trustee to a person who was not his cestui que trust, although made in the belief that the payee was a cestui que trust. In these circumstances even if the appellant had taken the best possible advice and had made the payment acting on such advice, I am of opinion that that would not have been sufficient to excuse him, regard being had to the fact that he was a trustee employed because of his professional skill and paid for his services in performing his duties. The authority referred to by Mr. Gavin Simonds of *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* (1), seems to me to be directly in point. In that case a trustee had paid two-thirds of a fund to persons other than the person entitled, and in making that payment he had acted on the advice of his solicitors and had acted honestly believing such advice to be good. In the judgment of the Board the following passage from Lord Redesdale's judgment in *Doyle* v. *Blake* (2) is quoted: "'I have no doubt that they' (the executors) 'meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts

(1) [1905] A. C. 373. (2) (1804) 2 Sch. & Lef. 231, 243.

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he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer.'" Lord Redesdale was there considering the primary liability of the trustee. When it came to the question whether he ought to be excused under a provision similar to that contained in s. 61 of the Trustee Act, 1925, the Board held that in the case of a trustee who acted in that capacity as part of his business and was paid for his services the Court ought not to excuse him. The judgment of the Board (1) states that: "It is a very material circumstance that the appellants" —the trustees—"are a limited joint stock company formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the colony authorizes them to retain out of trust funds administered by them, in addition to their costs. What they now ask the Court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the trust company from a loss they have incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee."

The appellant here in my opinion occupied a position similar to that of the Trust Company there. He is a chartered accountant carrying on business for his own profit; and in the course of such business and as part of it he undertakes to act as the liquidator of the company at a remuneration. If in so acting he incurs a loss by acting wrongly, although he may have acted honestly, I have come to the conclusion on the authority of the case I have cited that the Court would decline to hold either that he had acted reasonably or that he ought fairly to be excused for the breach of trust.

(1) [1905] A. C. 379, 381.

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But then it is said that under s. 30 the appellant—still on the assumption that he is a trustee—is not liable, because it has not been proved that he has been guilty of wilful default within the meaning of that section, and that therefore the loss which has been incurred is a loss incurred otherwise than through his own wilful default. It seems to me that that is a misconception of the effect of s. 30 in the circumstances prevailing in the present case. Sect. 30 was not intended to absolve a trustee from liability for paying trust funds in his hands or under his control to the wrong person. A trustee is always liable for the due application of trust funds received by him, and is accountable for all his own receipts; under the ordinary account he can only discharge himself by showing that he has paid the trust fund to the right person. The question whether he has acted honestly does not seem to me to enter into the question of his liability where he has received moneys which he has himself disbursed to the wrong person. The question whether the trust fund has suffered any "other loss" within the meaning of the latter part of the section through the wilful default of the trustee does not seem to me to be a question which the Court has to consider, when dealing with the disbursement by a trustee of trust funds actually come to his own hands. In many cases a trustee may honestly and under competent advice pay expenses out of and distribute trust money; but when an account is taken at the instance of the beneficiary, he will be charged, as still being in his hands, with any trust money which he cannot prove to have been properly disbursed by him; and that is the position of the appellant here, if he be a trustee. There is no question, in my opinion, here of wilful default at all. If s. 215 of the Companies (Consolidation) Act, 1908, had not existed and an action had been brought for an account against the liquidator on the footing of his being (as Mr. Topham contends) a trustee, an ordinary account would have been directed of his receipts and payments, and every payment which could not be vouched as having properly been made under the trust would be disallowed, and he would be treated as still having in his

hands the balance found to be due from him. There would be no loss and there would be no question of wilful default. In my judgment the words of the section relied upon are directed to an entirely different set of circumstances.

There only remains to be dealt with the question of the liability of the appellant assuming that he is not in the position of a trustee. It is contended that on that assumption his position is that of an ordinary agent. I doubt whether that is a true definition of his position. In many respects he undoubtedly acts as the agent for the company; but I think that Mr. Topham was quite right in saying that in some respects he certainly is in the position of a trustee. His office is a statutory office under which he has statutory duties to perform, including the getting in of the assets and the payment of the liabilities of the company and distribution of the surplus amongst the shareholders. It may well be that if looked upon as an ordinary agent, it would be necessary to show that the appellant had been negligent in the discharge of his duty, by paying away the proceeds of his realization of the company's assets contrary to his authority. Even if that be the position, the facts in the present case show that the appellant was guilty of negligence, and moreover they clearly show that he fell far short of the standard of diligence required of a liquidator in administering the assets of a company. It is difficult to conceive a much stronger case of negligence than the omission to apply to the Court where a claim is put forward against the company which the liquidator realizes may be wholly invalid, and which even if valid is difficult to assess; and the liquidator knows that the persons out of whose money he intends to pay it object to the payment.

Something has been said about the hardship of making the liquidator liable, but in the circumstances of this case I cannot blame the parties out of whose money the payment has been made for coming to the Court and asking the liquidator to replace the sums paid away. Of course, if the liquidator could have shown that the claim was a valid one, other questions would have arisen. It would then have

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been a question of quantum only, to which, I think, different considerations would have applied. As it is, however, it has been shown clearly that there was no valid claim at all. The liquidator having chosen with his eyes open to assume the functions of the Court or a judge and to decide that there was a valid claim must, I think, be taken to have done so at his own risk; and he cannot escape liability for having, out of the money belonging to persons who objected to the payment, paid a claim which turns out to have been altogether invalid.

For these reasons I agree with the conclusions arrived at by the learned judge, and am of opinion that this appeal fails and ought to be dismissed with costs.

RUSSELL L.J. I also agree that this appeal fails; and the matter has been so fully dealt with by the Master of the Rolls and Lawrence L.J. that I can state my reasons very shortly indeed. [His Lordship then decided that the firm had no valid claim for damages for breach of contract against the Windsor Company by reason of the sale of their assets, and continued:] If I am right in that, then the position is, that the liquidator, Mr. March, paid away a sum of 15,000*l.* to persons who had no claim to it, knowing that the persons who otherwise would be entitled to those moneys objected to the payment being made. In order to establish that that is an accurate description of the existing circumstances, I need only refer to a short passage in the evidence given before Maugham J. by Mr. March, in the course of which he says this: "I had a conversation with Mr. Lambert. He was dead against it"—that is, dead against the payment of 15,000*l.* "I think every 10 per cent. shareholder would have been against it. I considered the question of calling a meeting of shareholders. The ordinary shareholders alone could vote. They were not interested. I considered the question of applying to the Court. I was not disposed to question the view of Sir Walter." Then the learned judge reminds him that Sir Walter Nicholas had never expressed any view. He then says: "At least I had the opinion of

Morgan, Bruce & Nicholas. I knew the 10 per cent. preference shareholders alone were interested and that they objected." Pausing there for a moment, I think he was quite right in the view which he took, that it was useless to summon a meeting of the shareholders. But the fact that he was deprived of the protection of a resolution by the shareholders made it in my opinion additionally necessary for him to take the opinion of the Court under s. 193 of the Companies (Consolidation) Act, 1908.

The position accordingly is, that this payment was deliberately made by the liquidator without either consulting his own solicitors or obtaining the direction of the Court, or obtaining the consent of those whose interest it was that the payment should not be made.

If those are the true facts of the case, as I conceive they are, it remains then to consider the defence put forward by Mr. Topham on his behalf in order to evade and escape liability to replace the sum so paid away. The contentions are these. It is said that so far as a voluntary liquidator is in the position of a trustee, he is a trustee within the meaning of the Trustee Act, 1925, and accordingly entitled to the protection given by s. 61, and also to the protection given by s. 30. Alternatively it is said that in so far as he is not a trustee but is simply in the position of an ordinary agent, then he is protected, because the ordinary agent would not be liable unless he was guilty of negligence.

I will assume without deciding it that the liquidator is a trustee for the purpose of the Trustee Act, 1925. If that be so, then I turn to s. 61. Sect. 61 is the section which enables the Court to relieve a trustee in the circumstances there mentioned from the consequences of a breach of trust. In my opinion, assuming the section to apply to a liquidator, the facts in this case are such that not only does Mr. March fail to make out a case for relief under the section but that the facts establish against him a case for refusing relief. As regards s. 30 of the Act of 1925, the only words upon which Mr. Topham relied were the concluding words of the section: "Nor for any other loss, unless the same happens through

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his own wilful default." In my opinion, those words in s. 30 are not intended to apply and do not apply to the case of a trustee paying money away to the wrong cestui que trust.

As regards the suggestion that in so far as he is not a trustee but is merely an ordinary agent he is not liable, because he has not been guilty of negligence, I will assume in his favour that negligence is necessary to establish liability. In my opinion, if that be so, the evidence in this case establishes sufficient negligence to make him liable in this sum.

For those reasons I agree that the appeal fails and should be dismissed with costs.

Appeal dismissed,

Solicitors: *Ingledew, Sons & Brown, for Downing & Handcock, Cardiff; Churchill, Clapham & Co., for Elfyn David & Hamblen, Cardiff.*

H. C. G.

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In re A DEBTOR.

[No. 549 of 1928.]

Bankruptcy—Landlord and Tenant—Judgment for Rent—Petition by Landlord for Receiving Order—Subsequent Notice by Landlord to under Tenants of Tenant to pay Rent to him—Concurrent Remedies—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 6—*Bankruptcy Act,* 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*g*); *s.* 2, *proviso.*

Where a landlord has presented a bankruptcy petition against his tenant founded on non-compliance with a bankruptcy notice based on a judgment recovered by the landlord for rent in arrear, and subsequently gives notice under s. 6 of the Law of Distress Amendment Act, 1908, to the tenant's under tenants requiring them to pay their rent direct to him as superior landlord, he is not thereby prevented from continuing the bankruptcy proceedings and obtaining a receiving order against the tenant, provided that after the receipt of any rent from the under tenants there still remains due to him from the tenant a sum of not less than 50*l.*

APPEAL by the debtor from a receiving order made against him by Mr. Registrar Warmington.

The debtor was the tenant of certain premises of which the petitioning creditor was the landlord, and of which the debtor had sublet portions to under tenants. On May 22,

1928, the petitioning creditor recovered judgment against the debtor for a sum of 204*l.* in respect of rent and fire insurance, which by the addition of a sum for costs was increased to 215*l.* 17*s.* 6*d.* On June 1 he served a bankruptcy notice on the debtor based on this judgment. The notice not having been complied with, the act of bankruptcy became complete on June 9. On June 15 the petitioning creditor presented his petition in bankruptcy against the debtor. Later, some few days before the June quarter day, the petitioning creditor, in exercise of the powers given him by s. 6 of the Law of Distress Amendment Act, 1908 (1), served upon the debtor's under tenants a notice stating the amount of the arrears due to him, and requiring them to pay their rents direct to him as superior landlord. Under such notice one of the under tenants paid a sum of 62*l.* to the petitioning creditor, thereby reducing his total debt by that amount. The petition came on for hearing before the registrar on July 3, and was from time to time adjourned, and ultimately on July 31 a receiving order was made against the debtor.

The debtor appealed. The appeal was heard on October 19, 1928.

The only question calling for a report is whether the petitioning creditor by serving the notice under s. 6 of the Law of Distress Amendment Act, 1908, had precluded himself from continuing his proceedings in bankrupcty against the debtor.

Kingham for the debtor. It is submitted that the service of the notice by the petitioning creditor on the debtor's under

(1) Law of Distress Amendment Act, 1908, s. 6: "In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent."

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tenants under s. 6 of the Law of Distress Amendment Act, 1908, was an abuse of the practice of the Court. Its effect was to prevent the debtor from receiving money from his under tenants which would have been available for the payment of the petitioning creditor's debt. *In re Bond* (1), which was relied upon by the petitioning creditor at the hearing before the registrar, is distinguishable. There the creditor had obtained the appointment of a receiver before the presentation of a petition. It is not suggested that the bankruptcy notice was not a good notice when it was issued, but it is submitted that the subsequent proceedings in bankruptcy were invalidated by the subsequent service of the notice under the Act of 1908 and the receipt of the rent from the under tenant. The proceedings in bankruptcy ought therefore to be stayed.

[RUSSELL L.J. referred to *In re Renison*. (2)]

Tindale Davis for the petitioning creditor. All that the registrar had to do was to satisfy himself that after the payment by the under tenant of the 62*l*. there still remained a good petitioning creditor's debt of at least 50*l*. : *In re A Debtor*. (3)

[He was stopped.]

Kingham in reply.

LORD HANWORTH M.R. This appeal fails. It raises one point which may be said to be of some public interest.

The debtor is tenant to the petitioning creditor of certain premises in Victoria Street, parts of which he has sublet to under tenants at a profit rental. On May 22, 1928, judgment was obtained by the petitioning creditor against the debtor for 204*l*., being in respect of rent, rates and insurance, and the amount payable under the judgment was raised to 217*l*. odd by the addition of certain costs. In respect of that debt of 217*l*. the petitioning creditor, on June 1, served a bankruptcy notice upon the debtor. That notice was not complied with, and the result was that under s. 1, sub-s. 1 (*g*),

(1) [1911] 2 K. B. 988. (2) [1913] 2 K. B. 300.
(3) [1917] 2 K. B. 60.

of the Bankruptcy Act, 1914, an act of bankruptcy was committed by the debtor. Sub-s. 1 (*g*) provides that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, and he does not, within seven days after service of the notice . . . . either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid. . . . ." It is to be observed that there is a proviso to s. 2 of that Act which provides that a bankruptcy notice "shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement." It is quite clear, therefore, that in the present case an act of bankruptcy could be alleged against the debtor.

Now a petition for a receiving order was presented on June 5. Some few days later, before the June quarter day, the petitioning creditor, in exercise of the powers given him by s. 6 of the Law of Distress Amendment Act, 1908, served upon the under tenants of the premises a notice stating the amount of the arrears due to him, and requiring all rents to be paid direct to him as superior landlord until the arrears had been made up. There is no doubt that the petitioning creditor, as the superior landlord, had that statutory right to ask the under tenants to pay him direct, and in fact the sum of 62*l.* was received by him from one of those under tenants, so that the debt of 217*l.* has been in part liquidated. But at the time when the bankrupcty notice was issued it was a regular notice, and, it seems to me, that nothing intervened to prevent the operation of s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914.

There was a hearing before the registrar which was adjourned, and then there was a further hearing of July 3.

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Evidence was given upon that occasion as to the debtor's conduct, which was apparently not very satisfactory, but the hearing was adjourned until July 17. It was then adjourned again until July 31, upon the suggestion that if time were allowed to the debtor he might be able to make some arrangement which would enable him to pay his creditors in full. On July 31 it was again urged that the money could be paid if a reasonable time were granted by the registrar; but apparently the registrar thought that time enough had been given and he accordingly made a receiving order against the debtor, but stayed the advertisement of the order, at his request. From that order this appeal has been brought.

Mr. Kingham for the appellant takes two points. First, he says that the receiving order should not be made, because it would not give the debtor time to clear up his position. As regards that, I think the registrar came to the right conclusion. In my opinion the matter should pass into bankruptcy, and I really cannot say that the registrar has not exercised a proper discretion. But the other point taken is this. It is said that the petitioning creditor having exercised the power given him by s. 6 of the Law of Distress Amendment Act, 1908, has precluded himself from proceeding under the bankruptcy notice, because by giving the notice he has intercepted money which otherwise would have flowed into the coffers of the debtor and have been available for the payment of his creditors. In other words, Mr. Kingham contends that as the petitioning creditor has elected to adopt another mode of procedure—namely, that under the Act of 1908—all proceedings under the bankruptcy notice should be stayed. The petitioning creditor, he contends, should not be allowed to harass the debtor under two different modes of procedure. In my view that argument is not sound. Authority has been cited by counsel for the respondent which shows that if the sum of 50*l.* still remained owing to the petitioning creditor, it was the duty of the registrar to make a receiving order. I do not think that the point that the petitioning creditor is pursuing two inconsistent

remedies is a very convincing one. Two authorities, *In re Bond* (1) and *In re A Debtor* (2), were cited, which, I think, show that there is no ground for saying that the petitioning creditor is not entitled to proceed, if he still has a debt of over 50*l.* due to him. In my opinion the fact that the act of bankruptcy was complete on June 9 is enough. The remedy under s. 6 of the Law of Distress Amendment Act, 1908, is simply to prevent loss being suffered ; it is a remedy which may save assets which might otherwise go to the debtor. But I do not think that it affects the right of the petitioning creditor to obtain a receiving order if the proceedings he has taken are in order and the debt still due to him is of the required amount.

LAWRENCE L.J. I agree. It is not disputed that the bankruptcy notice was perfectly valid, that the debtor failed to comply with it, and that the bankruptcy petition was properly presented.

But Mr. Kingham contended that the subsequent service by the petitioning creditor on the debtor's under tenants of a notice under s. 6 of the Law of Distress Amendment Act, 1908, and the consequences which ensued on the service of that notice constituted sufficient cause why no receiving order ought to be made within the meaning of s. 5, sub-s. 2, of the Bankruptcy Act, 1914. It is said that the action taken by the petitioning creditor has prevented the debtor from receiving the rents otherwise payable to him, and has therefore hindered him in discharging his debts. What actually happened was that one of the under tenants paid his rent, amounting to about 62*l.*, to the petitioning creditor, with the result that if the petitioning creditor is entitled to retain this sum as against the trustee in bankruptcy (a question upon which I express no opinion) the petitioning creditor's debt would be reduced by that amount, but there would still be left the balance of the debt, which is sufficient in amount to support the bankruptcy petition. Another under tenant refused to pay his rent, amounting to 62*l.* 10*s.*, either to the petitioning

(1) [1911] 2 K. B. 988. (2) [1917] 2 K. B. 60.

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creditor or to the debtor, but agreed with the debtor to place the amount due in the joint names of the solicitors of the under tenant and of the debtor. The under tenant apparently adopted this course because he had notice of the act of bankruptcy, and he was, in my opinion, well advised in acting as he did.

In view of these facts and of the other facts stated by the Master of the Rolls, which I will not repeat, it is idle to suggest that the action of the petitioning creditor has in any way prevented or hindered the debtor from discharging his debts. Nor has the conduct of the petitioning creditor in taking steps to prevent the rents due from the under tenants reaching the debtor in my opinion been such as to disentitle him to a receiving order.

In my judgment, therefore, the debtor has not shown any sufficient cause why a receiving order should not be made, with the result that the appeal fails and ought to be dismissed.

RUSSELL L.J. I agree that the appeal fails. When the dates in this case are borne in mind the bottom falls out of Mr. Kingham's argument. The dates are : The judgment was recovered on May 22, 1928 ; the bankruptcy notice was served on June 1 ; and the act of bankruptcy became complete by non-compliance on June 9 ; and shortly before June 24 the notice under s. 6 of the Law of Distress Amendment Act, 1908, was given. In my judgment it is impossible to say that the notice given to the under tenants operated to prevent the debtor from complying with the bankruptcy notice. The order made by the registrar, therefore, was, in my opinion, a proper order.

Appeal dismissed.

Solicitor for appellant : *W. G. Elsmore.*
Solicitors for respondent : *Smythe & Brettell.*

W. I. C.

A. AND C. BLACK, LIMITED *v.* CLAUDE STACEY, LIMITED.

TOMLIN J.

1928

Feb. 29; *Mar.* 1.

[1926. A. 2296.]

Copyright—Infringement—Reproduction—Work of reference—Compilation of biographies—Authorship—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 5, 6, 7.

Where information is given to the compiler of a biographical work of reference not otherwise than as material to be used by the compiler, the person who supplies the information to the compiler is not the author for the purposes of the Copyright Act, 1911.

Nisbet & Co. v. *The Golf Agency* (1907) 23 Times L. R. 370 followed.

WITNESS ACTION.

The plaintiffs were the publishers of a work of reference entitled "Who's Who." The defendants published a book containing the names and particulars of the careers of persons of distinction in certain English counties. This book was entitled "Men of the West." The plaintiffs commenced an action against the defendants, in which they alleged that the defendants had infringed the copyright of the plaintiffs in "Who's Who" by publishing and selling copies of "Men of the West" containing a large number of biographies which were reproductions in whole or in part of biographies contained in "Who's Who." The plaintiffs therefore sought an injunction to restrain the defendants from infringing their copyright in "Who's Who," delivery up of all copies of "Men of the West," and damages.

Macgillivray for the plaintiffs. The defendants have clearly infringed the plaintiffs' copyright within the authorities. The question as to the authorship of biographies of this kind has been considered in *Nisbet & Co.* v. *The Golf Agency*. (1) The plaintiffs claim copyright in respect of the compilation of the information. The only literary work here is compilation: *Morris* v. *Ashbee*. (2)

[He also referred to *Kelly* v. *Morris* (3); *Morris* v. *Wright* (4); *Cox* v. *Land and Water Journal Co.* (5); *Weatherby & Sons* v.

(1) 23 Times L. R. 370.
(2) (1868) L. R. 7 Eq. 34.
(3) (1866) L. R. 1 Eq. 697.
(4) (1870) L. R. 5 Ch. 279.
(5) (1869) L. R. 9 Eq. 324.

TOMLIN J. *International Horse Agency and Exchange, Ld.* (1); and *H. Blacklock & Co.* v. *C. Arthur Pearson, Ltd.* (2)]

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Jolly for the defendants. When the biographer fills in the questionnaire he writes as an author, and "Who's Who" cannot obtain the copyright in his mode of expression. The account could be handed over to some one else, because there is no consideration. "Who's Who" is a compilation, and the plaintiffs have the right to copyright only as compilers. The work consists of a compilation of autobiographies, and the copyright of each autobiography is in the author.

[He referred to *Macmillan & Co.* v. *Cooper.* (3)]

Macgillivray in reply.

TOMLIN J. [after stating the facts continued:] The complaint of the plaintiffs is that in the preparation of "Men of the West" the defendants have taken, bodily, extracts from "Who's Who" and have used them in "Men of the West." I have seen the witnesses in the box. I have examined with care the extracts in relation to 15 cases which have been gone into in detail by the plaintiffs, it being alleged by them that 87 cases in all are copied, and, having regard to the evidence which I have heard, I am satisfied that the 15 cases, and probably a considerable number, if not all, of the 87 cases are the result of a process in which the defendants have made a use of "Who's Who," which they were not entitled to make. [His Lordship examined the evidence in detail and continued:]

The defence which has been advanced has been really based upon points of law, and it was urged that a compilation of this sort is one in which the copyright in the particular entries is not in the compilers, although they may have a general copyright in the compilation, but that as to each particular entry the copyright is vested in the person to whom it refers on the ground that when a questionnaire of this kind is sent out and is answered, the person who answers it is the author, and that the answers, when embodied in the compilation,

(1) [1910] 2 Ch. 297.
(2) [1915] 2 Ch. 376.
(3) [1924] W. N. 16; 40 Times L. R. 186.

remain vested, so far as copyright is concerned, in the person who originally wrote them. The defendants' counsel, being faced with what the results of that would be, seemed to accept the consequence that, if a man calls and asks for particulars on the doorstep and is given them verbally and notes them down in his notebook, in that case, at any rate, the "life" would have no copyright in the resulting production; but on the other hand, if the "life," instead of giving the information verbally to the man, says: "I will write it down on a sheet of paper and give it to you," he has a copyright, and if the person who does that happens to be not the owner of the house, but the servant who answers the door, it is the servant who has the copyright. That seems to me a very surprising state of things, and not to be accepted unless the argument leading to such a result is already well founded. I think there is no foundation for it on principle. It seems to me that where a book of this sort is being compiled and the compiler invites information, the information given, whether it be given verbally or in writing, is not given otherwise than as material available for use by the compiler, and that, if it happens to be written, the man who writes it is not the author of something in which he has a copyright in any sense contemplated by the Copyright Act.

As a matter of fact, it appears that the case is really covered by the decision of Kekewich J. in *Nisbet & Co.* v. *The Golf Agency* (1), and I think that apart from any other consideration I ought not to depart from that decision.

I therefore think that the defence based upon that point of law must fail, and, as I have already indicated that in my view there has been a user of a kind which is improper of matter in which there is copyright of the plaintiffs the action must succeed.

The plaintiffs are entitled to an injunction to restrain the defendants, their servants and agents, from printing, publishing, selling, exposing or offering for sale any copy or copies of the book entitled "Men of the West" containing

(1) 23 Times L. R. 370.

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passages copied from or only colourably altered from the passages appearing in the plaintiffs' work, "Who's Who." Then I think they are entitled to delivery up upon oath of those parts of the book which represent passages copied or colourably altered. There will be an inquiry as to damages for conversion, but, in directing that inquiry, I am not expressing any view as to what is the proper measure of damages, and it must not be taken that the plaintiffs are entitled to treat the whole book, for the purpose of conversion, as their property. The plaintiffs will be entitled to the costs of the action.

Solicitors: *Field, Roscoe & Co.; Milner & Bickford.*

J. L. D.

MAUGHAM J.
1928
July 4, 5, 6.

In re F. AND E. STANTON, LIMITED.

[1927. S. 00449.]

Company—Winding Up—Debentures—Floating Charge—Within Three Months of Winding Up—Cash paid "at the time of and in consideration for the charge" — Validity of Charge — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 210, 212.

Moneys were advanced on the security of debentures creating a floating charge on the property and assets of the company. Fifty-four days elapsed after the first advance and five days after the last advance before the issue of the debentures on January 20, 1926. The delay in the issue of the debentures was not acquiesced in by the lenders, who when they sent cheques for the advances wrote that the money was in further payment on account of debentures to be issued as arranged. The company went into liquidation on January 25, 1926. During the period in which the bulk of the advances were made the lenders were unaware that the company was on the verge of liquidation. The debentures were issued when the company was unable to pay its debts:—

Held, that the debentures were valid, the payments being made "at the time of" the creation of the charge and in consideration for the charge within the meaning of s. 212 of the Companies (Consolidation) Act, 1908, and consequently the debentures were not a fraudulent preference within the meaning of s. 210 of that Act.

In re Columbian Fireproofing Co., Ld. [1910] 1 Ch. 758 applied.

THE facts were stated as follows by his Lordship in his judgment:—

This is a motion in the matter of the Companies (Consolidation) Act, 1908, and in the matter of F. & E. Stanton, Ld., which was first moved in the county court of Kent holden at Greenwich. It has been the subject of a proceeding reported as *In re F. & E. Stanton, Ld.* (1), in which a Divisional Court held that the county court had jurisdiction to hear this motion. An application was then made to Romer J. on the ground that it was not a proper matter to be heard in the county court, and an order dated January 23, 1928, was made by Romer J. in chambers that the proceedings should be transferred from the county court to this Court, and it was ordered that points of claim and defence be delivered, lists of documents exchanged, the costs of the application to be costs in the motion. The applicant, Samuel Rolleston Hogg, who was appointed on April 14, 1926, liquidator in the winding up of the company, asks, firstly, stating it shortly, that certain debentures purporting to have been created by the company in favour of Edwin Maule and Albert Ernest Harris, two of the respondents, are invalid either under s. 212 (2) of the Act or, alternatively, under sub-ss. 1 and 2 of s. 210; secondly, that the respondents Maule and Harris, and a third respondent Albert Houghton, alleged to have been appointed their receiver under powers contained in the said debentures, should pay to the applicant, who is the liquidator of the company, all property and moneys received by Albert Houghton as such alleged receiver, including the sum of 2700*l.* paid over by him to Messrs. Maule and Harris, and including also a certain sum amounting to 1369*l.* 10*s.* 4*d.* money alleged to be in the hands of Albert Houghton as such receiver, and incidental relief.

There is no doubt that the company at the time when these debentures were created was insolvent, and there is

(1) [1928] 1 K. B. 464.

(2) Sect. 212: "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum."

MAUGHAM J.
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also no doubt that debentures were created within a very few days of the commencement of the winding up, so the only way in which they can be supported is by showing that they were given as security for cash paid to the company at the time of, or subsequent to, the creation of, and in consideration for, the charge. In this particular case what is alleged is that the sums were advanced within the true meaning of s. 212 at the time of the creation of the charge and in consideration for it. The facts, according to my understanding of them, which has been confirmed after careful consideration both of the affidavits filed upon the motion and the evidence given before me by Mr. Maule, Mr. Harris and Mr. Oakley, are as follows: The respondents Maule and Harris were wholly unconnected with the company until the year 1925, and they never at any time have been officers of the company; but they became in January, 1925, for the first time, associated with the company as selling agents in respect of part of the produce or manufactures of the company. They never received a penny from the company, and indeed they advanced 600*l.* without security to the company, a sum which still remains owing to them as unsecured creditors: and I think another sum of 300*l.* became due to them as such selling agents. The company in fact had carried on business at a very considerable loss for some years. It had apparently exhausted its cash resources and was unable to execute the orders which the respondents obtained for it, because of its inability to get delivery of raw material which was wanted for the performance or execution of such orders. At first it appears that Messrs. Maule and Harris were unable quite to understand why there was a difficulty or delay; but finally they were informed by Mr. Windsor, who was an officer of the company, that the company was short of cash and was unable to get its raw materials. They were asked whether they would supply what they were told was a temporary shortage of cash by making a substantial advance to the company. Mr. Stanton was the only director, the managing director and the secretary of the company; and quite early in the month of October, 1925, Messrs. Maule and Harris met Mr. Stanton, and he told them that he and

a relative were entitled to a sum of 12,000*l.* under a trust, the relative only being entitled to a participation for life, and that he, Stanton, was sure he could persuade the relative in question to advance 10,000*l.* on the debentures which he proposed to issue; and he asked Messrs. Maule and Harris whether they would advance 5000*l.* I am quite unable to see how it can be plausibly suggested that in the circumstances of the case Messrs. Maule and Harris would have been likely, if they were sane people, to advance any further moneys to this company unless they were going to be secured, because it is part of the case of the liquidator, relied on as a fact, that at this time they knew the company was insolvent. The view I have formed is that the company was in a bad way at this time, but that Mr. Stanton managed to persuade Messrs. Maule & Harris that with an additional sum of 15,000*l.*, of which he and his relative were going to advance 10,000*l.*, and of which they were going to advance 5000*l.*, the company could be put on its legs again. Moreover the facts, which have been established quite clearly I think, show that there never was any idea at all of making this advance, except on debentures. The solicitors for the company were a firm of Leader, Plunkett & Leader, 49 Newgate Street, and the managing clerk, who was looking after the affairs of the company on behalf of that firm, was Mr. N. S. Oakley, who has sworn an affidavit, and who has been examined before me. He kept, at the time, records in the ordinary books of his firm of what took place at the various interviews, and I have not myself the smallest doubt that I ought to accept as being accurate those records, which, of course, Mr. Oakley had no motive at all to record in an inaccurate manner. On November 23, 1925, Mr. Oakley notes this: "Attending Mr. Houghton, Mr. Windsor and Messrs Maule, Harris & Co."—that was the name under which the two respondents Maule and Harris were carrying on business—"from 2 P.M. until 4.10 P.M."—a fairly long interview—"going through the balance-sheets prepared by Crane, Houghton & Crane for December, 1924, and June, 1925"—Messrs. Crane, Houghton & Crane were the auditors of the company and Mr. Houghton was the

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gentleman who was concerned and subsequently appointed receiver of the debenture holders, and is the third respondent to the motion—"Long discussion as to figures and as to how enormous loss had been incurred"—he is not there blinking the fact that the company had sustained an enormous loss—"and eventually after long discussion Messrs. Maule, Harris & Co. stated they were prepared to put 4000*l.* to 5000*l.* in debentures and Mr. Windsor stated Mr. Stanton would arrange to put 10,000*l.* of trust fund which was eventually coming to him and he would see his co-trustee as to arranging the matter." I put implicit reliance upon that minute or note as to what took place. It accords entirely with what Messrs. Maule and Harris have told me. And, moreover, having regard to the discussion which took place, and to the fact that an enormous loss had been disclosed in the balance-sheets (which one of them, at any rate Mr. Harris, would understand), it would have been absolutely mad to have advanced this substantial sum except on a positive undertaking as to the debentures. The next entry I have is on November 24: "Attending Mr. Houghton and Mr. Stanton going through the two balance-sheets with him explaining the proposals come to at the meeting yesterday and arranging for him to immediately see trustee with regard to proposal of 10,000*l.* upon the first debenture 10–12.30"—that is the time of the interview. Now that is exactly the story which I have been told. These gentlemen were assured that Mr. Stanton, who was the principal creditor of the company, could find another 10,000*l.* That shows he had confidence in the company and thought it was worth his while to risk 10,000*l.*, which was substantially his own money, to put the company on its legs again. Upon that Messrs. Maule and Harris, whose only interest in the company was that they desired it should go on in order that they should continue to make something out of the business of selling agents, were going to put up 4000*l.* to 5000*l.* as their own. I cannot see anything suspicious in that story at all. It seems to me quite a natural story, and on December 1, with the understanding that that was going to be done, I have

the record: "Preparation of 15 debentures," and I have the draft before me which has been exhibited. Three days before December 1—namely, on November 27—I have a minute of an ordinary general meeting of the company held "at 26 Dartmouth Row, Blackheath (owing to weather conditions), at 10.30 A.M. Present Mr. E. A. Stanton in the chair, also present Mrs. R. Stanton and Mr. R. H. Windsor." The fifth item stated there is: "Resolved. That the company issue 15,000*l.* 7 per cent. debenture stock." That purports to be signed by the chairman. Now it is quite true that this minute is recorded not on one of the original pages of the book in the place where it originally stood, but takes the place of a minute more or less in the same terms, but which was for some reason or another considered an unsatisfactory record of the proceedings. I can quite understand how the liquidator in the first instance, on seeing that the minute book had been in some way altered, was suspicious and doubted whether this resolution had been passed. But then I know a great deal more than the liquidator knew, and the minute is perfectly consistent with what Mr. Oakley told me, that he advised them that they must have a resolution settled. Quite apart from this, if the minute book had not been introduced, I should have come to the conclusion that almost certainly some resolution of this sort had been passed. What I think has happened—and it is a mere conjecture—is that the original minute was written out badly with some errors and that some person, I do not know who, cut a page out of the same minute book and later copied out with the amendments the minute of November 27, 1925, as it now stands first in the way of correcting an inaccurate record. The minute, as I have said, purports to be signed by Stanton as chairman. I see nothing in the least suspicious in that and, of course, as I have already pointed out, Messrs. Maule and Harris have nothing to do with the company or with the preparation of this minute. I should add that the day after the resolution the respondents Maule and Harris proceed to make advances to the company. They start on November 28 with the sum of 300*l.*, and then there are other advances which are set

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out in para. 5 of the points of claim, which I will not go through in detail. But as each sum is sent in the form of a cheque to the company, Mr. Maule and Mr. Harris send a covering letter. I need not read all the letters, but I will read this one, which was sent on November 27, and which accompanied the first sum of 300*l.*, for which the company gives credit in its books on the following day: "27th November, 1925. E. Maule to the Company. Dear Sirs, Enclosed please find cheque value 300*l.* on account of debentures to be issued as arranged. Please acknowledge same."

On the same day Mr. Harris writes a letter substantially in the same terms, and the cheques have been produced. Then also on November 27 there is a receipt signed by Mr. Windsor on behalf of the company: "We have received this day from Mr. E. Maule and A. Harris the sum of 300*l.* each, being in advance of debentures to be issued by F. & E. Stanton, Ld., being 600*l.* in all." Now the respondents Maule and Harris were in constant touch with the company as selling agents, and they were constantly sending down documents and things of that sort to Lewisham, where the company had its mills, and I have no doubt they did not think it particularly wise or prudent to pay these moneys to the company too quickly, because they no doubt became aware in the course of the next month—in fact there is evidence that they did become aware in the course of the next month—that there was a hitch in regard to Mr. Stanton finding his 10,000*l.* Accordingly, they doled out their sums as the company needed them, and they were paying the amounts mentioned in para. 5 in the points of claim, the whole amount, excepting the two final sums of 100*l.*, being advanced by December 22. With each of these advances are letters which would show that the sums are paid on account of debentures. On December 8 they sent to the company 750*l.* each, a total of 1500*l.*, and Mr. Harris wrote this letter to the company on that day: "Dear Sirs, I beg to enclose you herewith cheque value 750*l.* being further payment on account of debentures to be issued to me as arranged. I shall be glad to hear that the debenture deeds

are in course of preparation ready for completion which I hope to make shortly." Now that is December 8, and that, of course, is a comparatively short time after the resolution to create debentures. As I have said, there was this hitch, that Mr. Stanton, after a lot of negotiation with his co-trustee or his relative, was finding himself unable to pay the 10,000*l.* in question. It is not perhaps immaterial that between December 8 and January 16, when the last 100*l.* was supplied by each of these two gentlemen, the Christmas holidays intervened; and it is also not immaterial to consider that Messrs. Maule and Harris were in considerable difficulty when they realized that notwithstanding all Mr. Stanton's efforts, he could not get the 10,000*l.* A firm called Stibbs were advancing some moneys, and the original proposal, as embodied in the minute of November 27, had no doubt not been carried out. Accordingly, it was not till January 19, 1926, that the next material entry is made by Mr. Oakley. It is in this form: "On receipt of letter from you asking for debentures attending Mr. Windsor on the telephone informing him Mr. Oakley had left and from instructions he had left we understood you promised to let us have certain particulars and until he gave us these it was impossible for us to complete the debentures when he informed us the amount of debentures to be issued to Mr. Maule and Mr. Harris and arranging that they should be got ready first thing in the morning and sent down by hand and further arranging that he would get Mr. Oakley to call first thing in the morning. Preparation of 10 debentures." Then on January 20 he finished his record and says: "Attending Mr. Stanton at Lewisham interviewing Mr. Windsor obtaining full particulars with regard to debentures which he informed us he had been able to telephone for late yesterday evening, and arranging we should have same prepared this morning and sent down by one of our messengers who would wait for same to be duly completed and return when we would immediately proceed to have same registered. Attending Mr. Windsor on the 'phone informing him our messenger had left with the debentures." And on the 21st: "Attending

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at your premises at Lewisham, obtaining the said debentures duly executed and later preparing necessary forms to be registered, attending stamping 10 debentures, attending Companies Department and presenting same for registration." Now in cross-examination there has been an attempt to show that the letters before us, which purport to be letters from Messrs. Maule and Harris sent at the time when they were sending the cheques for the amount of their advances, were really not sent at the time, and were subsequent concoctions. I quite understand the liquidator being suspicious, as he has a right to be in all these cases of debentures issued on the verge of liquidation; but I am now satisfied that there are no grounds at all for those suspicions. I think the letters are of the most natural character. I think there is no doubt at all that the letters were sent. It so happens that they came into the possession of Mr. Oakley, and remained in his possession on behalf of his principals, Messrs. Leader, Plunkett & Leader, and for that reason the liquidator of the company did not find them amongst the papers of the company at the date of the liquidation. But I have heard Messrs. Maule and Harris give their evidence, and I am quite convinced that the letters were sent accompanying the cheques. The last letter, sent after considerable delay, namely, on January 15, 1926, is signed by both Mr. Harris and Mr. Maule, and is in these terms: "Dear Sirs, Enclosed you have cheques values Mr. A. E. Harris 100*l.*, Mr. E. Maule 100*l.*, which completes payment of Debentures (7 per cent.) which we shall be glad if you will now complete immediately in the following names: Mr. Albert Ernest Harris, Quaint Cottage, Peake Hill, Purley, and Mr. Edwin Maule, 'Dalhousie,' Chiddingfold, Surrey, in equal moieties of 2250*l.* (Two thousand two hundred and fifty pounds) each. Please acknowledge. Yours truly, A. Harris and E. Maule." Now I am asked, or rather the liquidator asks, why they sent 100*l.* each on January 15, 1926, and why did they wait from the preceding December 22, or why did they wait from a still earlier date, December 2, before insisting upon the

debentures. Well, I have the evidence of Mr. Harris, which I entirely credit, that, being in constant touch with the company or its officers, he did again and again tell them that he wanted the debentures. I see not the smallest reason for thinking that it was to their interest to connive in the company delaying an issue of debentures and therefore delaying the registration, which would follow within twenty-one days of the issue. I think that the right conclusion of fact is as follows:—Messrs. Maule and Harris were desirous of obtaining the debentures as soon as conveniently might be, and they would have obtained such debentures within a very short time after November 27, if Mr. Stanton had been able to complete his arrangements to advance his 10,000*l.* The negotiations, which of course were of vital importance to Mr. Stanton, by which he was endeavouring to get that money, were prolonged, and therefore it did take a considerable time before it was definitely ascertained that he could not get the money. Then Messrs. Maule and Harris said: Now we must have the debentures. I have not the least doubt, and in fact they admit, that by January 15, 1926, by which time they knew Mr. Stanton's 10,000*l.* could not be procured, they also knew that the company was in difficulty, and I dare say they knew that the immediate issue of debentures was a matter of very great importance; but, on the other hand, when they made the bulk of the advances, that is to say, all the advances down to December 22, 1925, I have no reason at all to think that they knew that the company was on the verge of liquidation. The company in fact went into liquidation on the presentation of a petition on January 25, 1926, five days after the creation of the debentures.

Vaisey K.C. and *Oscar Kean* for the applicant. This may be fraudulent preference within s. 210 of the Companies (Consolidation) Act, 1908.

[MAUGHAM J. But these debentures cannot constitute a fraudulent preference within s. 210 if I come to the conclusion that the moneys advanced by the respondents were

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advanced at the time of the creation of the debentures within the meaning of the exception contained in s. 212.]

Vaisey K.C. No, they cannot in that event be a fraudulent preference, and the onus is on the respondents to show that they are within the exception.

Clayton K.C. and *A. de W. Mulligan* for the respondents. In every such case as this it is always a question of fact whether the moneys were advanced at the time of the creation of the debentures. These moneys were in fact advanced between November 28, 1925, and January 15, 1926. The word "time" in the expression "at the time of" in s. 212 does not necessarily mean contemporary with: *In re Columbian Fireproofing Co.* (1) Payments made on account of the security in reliance on a promise to issue debentures are made "at the time of" within the exception in the section. It does not depend on the number of days which elapse between the payments and the issue of debentures as security for them. The security is valid if its issue is not postponed at the instigation of the borrower, and it is clear that the respondents here constantly asked that the debentures should be issued and would have insisted on the issue long before if the 10,000*l.* had been forthcoming, as promised by Mr. Stanton, the only director. There was a promise to issue debentures before any money was advanced. The respondents were told the company required 15,000*l.* to put it on its legs, and would only advance their proportion of that sum on a promise that they should have debentures to secure it. In the *Columbian Fireproofing* case (1) the money was advanced eleven days before the issue of the debentures. In the Irish case of *In re Olderfleet Shipbuilding Co.* (2) twenty-five days elapsed, and in the unreported case before Romer J., *In re Nathan, Hope & Son, Ld.*, in which judgment was delivered on June 5, 1924, sixty-seven days intervened. There having been in this case an offer of debentures and an acceptance by payment the cash was paid to the company within the language of s. 212 at the time of the creation of the security.

(1) [1910] 1 Ch. 758. (2) [1922] 1 I. R. 26.

After evidence had been given.

[MAUGHAM J. Prima facie this comes within the case before Romer J. : *In re Nathan, Hope & Son, Ld.*]

Kean. The debentures were only asked for, because the respondents knew that if they waited any longer they would get nothing ; there must be some limit of time, you cannot wait until the company is on the brink of a precipice. The respondents could have compelled the company or the directors to issue the debentures or refused to advance any further money. I submit there was here what amounted to acquiescence by the respondents in the delay to issue debentures. The circumstances in *In re Nathan, Hope & Son, Ld.*, were different, and that case is distinguishable. To show that they did not acquiesce in the delay the respondents must prove they took all reasonable steps to obtain the execution of the debentures : see *Ex parte Hauxwell.* (1) In *In re Nathan, Hope & Son, Ld.*, the issue of the debenture was held back by the managing director of the company. You would have to add to s. 212 : "or unless the money is paid in advance under an agreement to grant a security." Sect. 212 cannot apply to any advance as long as it is made on the promise of a security subsequently given.

MAUGHAM J. [his Lordship stated the facts and continued :] Now the claims that the debentures are invalid are rested upon s. 212, or alternatively, s. 210, of the Companies (Consolidation) Act, 1908, the first section, s. 212, being the one under which a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up is void, unless it is proved that the company immediately after the creation of the charge was solvent, except to the amount of any cash paid to the company at the time of, or subsequent to, the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. The other section referred to, s. 210, is the one under which any conveyance,

(1) (1883) 23 Ch. D. 626, 640.

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mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall if made or done by or against a company, be deemed in the event of its being wound up a fraudulent preference of the creditors of the company and be deemed invalid accordingly. In my view, which I think is borne out by the fact that counsel for the applicant, the liquidator, accepted it, it is quite impossible if, in this case, I come to the conclusion that the moneys advanced by the respondents were advanced at the time of the creation of the debentures, to hold that the debentures constitute in some way a fraudulent preference within s. 210. It has long been held, commencing with the case of *Bills* v. *Smith* (1), a case of great authority, that if moneys are advanced on an actual obligation by the debtor to give security, the giving of that security on the verge of bankruptcy does not constitute a fraudulent preference: and such cases as *Ex parte Hodgkin* (2) recognize that to be law. Accordingly, I will say no more with reference to s. 210, and will now devote my remarks to s. 212, as relied on for the purposes of this motion.

Now I have to apply the law. On the law I have the assistance of several cases of considerable value. The first is the well known case of *In re Columbian Fireproofing Co.* (3) That is a decision of Neville J., which was approved by the Court of Appeal without qualification. (4) The decision amounts to this: That in each case where a question arises under s. 212, where cash has been paid to the company at the time of the creation of the debentures, it is a question of fact, under all the circumstances of the case, whether the sum paid before the issue of the debentures was cash paid to the company at the time of the creation of the security. The word "time" is held by Neville J. and by the Court of Appeal to be in that connection an indefinite word, and it was held that: "A payment made on account of the

(1) (1865) 6 B. & S. 314.
(2) (1875) L. R. 20 Eq. 746.
(3) [1910] 1 Ch. 758, 765.
(4) [1910] 2 Ch. 120.

consideration for the security, in anticipation of its creation and in reliance on a promise to execute it, although made some days before its execution, is made at the time of its creation within the meaning of the section." I have not a doubt here, as I have already said, that the payments were made on account of the consideration and in anticipation of its creation and in reliance on a promise to execute, and the real difficulty is whether the lapse of time which took place between that promise and between the payments made in reliance on that promise and the actual date of the issue of the debentures is so long that I ought to hold that the exception in the section does not apply. In that matter I have two other cases which seem to help me to some extent. One is an Irish case of *In re Olderfleet Shipbuilding Co.* (1), and the other is an unreported case of *In re Nathan, Hope & Son, Ld.*, where the judgment of Romer J. was delivered on June 5, 1924. I have had the advantage of reading a shorthand note of the judgment in that case. In both of those cases there was a substantial delay between the dates of the payment in reliance on the promise to issue debentures and the date upon which the debentures were secured, and, in fact, in the case before Romer J., there was a delay of not less than sixty-seven days after the first advance and fifteen days after the last advance, before the issue of the debentures. In the present case the delay is serious, but not so serious as that. There were fifty-four days after the first advance and five days after the last advance before the issue of the debentures.

Now I am myself strongly of opinion that the exception in s. 212 in regard to cash advances at the time will not avail the debenture holder if the delay in the issue of the debenture is one which he has himself procured or suggested, or if the delay is one in which he has in any true sense acquiesced. I am not thinking of a delay such as would ordinarily be necessary for the passing of the resolution and the consideration of the form of the debenture and its actual execution, because the four or five days necessary in most

(1) [1922] 1 I. R. 26.

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cases to do those things is clearly not a delay which, according to the authority of the first case I have mentioned, the *Columbian Fireproofing* case (1), would be sufficient to invalidate the debentures if the cash had been or was being paid. But I think a delay greater than that requires explanation. In the present case I think there is sufficient explanation in the circumstances which I have mentioned, and I come to the conclusion as a fact that the delay was not acquiesced in by either Maule or Harris. I think these were people who had promised to advance between 4000*l.* and 5000*l.* in complete reliance on the promise that Mr. Stanton would find a sum twice that amount, and I think it was natural and reasonable that they should be not unduly pressing whilst Mr. Stanton was trying to obtain the 10,000*l.* in question. I think there is evidence that they did repeatedly request debentures to be issued to them. I think the letter of December 8 that I have mentioned is sufficient to show that they were not voluntarily acquiescing in a delay in the issue of the debentures in order to deceive people who presumably might be creditors of the company; and on the whole I think the delay is sufficiently explained. The question is, as the Master of the Rolls has said in the *Columbian Fireproofing* case (1), a question of fact, and I come to the conclusion as a fact that the sums in question were paid within the true meaning of s. 212 at the time of the creation of the charge and in consideration for the charge. In these circumstances I hold that the claim of the liquidator fails. Now, Mr. Clayton, your client is only entitled, is not he, to interest at 5 per cent.?

Clayton K.C. Yes, my Lord, the debentures only reserve the interest at 5 per cent. from the time of the issue of the debentures. I do not know if it would make any difference in this case, but the 5 per cent. is to run from the payments of the amounts, and I am quite content to take the 5 per cent. from the date of the debentures. I think it probably makes no difference, because I think the amount is not great.

(1) [1910] 1 Ch. 758, 765.

But if you will look at the section I think the section reads that if you retain a higher interest it is to be reduced to 5 per cent., but to 5 per cent. only. It does not say so in terms. It is at the rate of 5 per cent. per annum, and therefore it must mean from some date, and the date from which it would start cannot be, I think, on the section, the date of the advances. But however that may be, I think that if your Lordship declares that the debentures were valid to the amount of so and so, namely, the aggregate of the various amounts paid to the company at the time, and follows the words of the section, together with interest on that amount at the rate of 5 per cent. per annum from the date of the debentures, that will be sufficient.

Judgment for defendants.

Solicitors for applicant: *Dalston, Sons & Elliman.*
Solicitors for respondents: *Leader, Plunkett & Leader.*

G. P. L.

In re ACKLOM.

OAKESHOTT *v.* HAWKINS.

[1928. A. 972.]

Settled Land—Tenant for Life and Remainderman—Bequest of leasehold House and Contents to Trustees for A. for Life or so long as she wished to continue to reside there—Absence Abroad from Ill-health—Letting and Sale of House by her—Interest in the Proceeds of the House and Contents and the Income thereof—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106.

By his will dated January 4, 1918, the above named testator bequeathed his leasehold house, garden and grounds, Wiseton Court, Bournemouth, together with the fixtures and fittings and all his furniture, pictures (except some), china, plate, linen, grand piano, and all chattels and other effects therein, to his trustees upon trust to permit his sister, E. Hawkins, to reside there after his death, if she should wish to do so, and to have the use and enjoyment thereof during her life free of rent or other payment, and he gave to his said sister the use and enjoyment of his said house, garden and grounds, and everything contained therein, for her life accordingly, and he directed his trustees after her death or during her life if she should not wish to reside or continue to reside there to sell the same (except certain articles therein), with power to postpone such

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sale as they might think proper, and divide the proceeds between certain charities.

He died on June 26, 1918, and the lady entered into possession thereof immediately. In 1925 she went abroad temporarily for the benefit of her health, the place being left in charge of servants, and she paid the Sch. A tax. In 1926, owing to severe illness, she was prevented from returning to England, and the house was let by her from time to time, and she still paid Sch. A tax thereon. In 1927 she sold the house as tenant for life or a person having the powers of a tenant for life, and shortly after the contents (other than the excepted articles) were sold by the trustees. On a summons taken out by the trustees asking whether she had any, and, if any, what interest in the proceeds of sale of the leasehold property and the income thereof:—

Held, on the evidence, that it must be deemed that those powers were properly exercised by her. The power of sale in the trustees never arose, nor did they purport to exercise it. She had not therefore forfeited her interest in the proceeds of sale of the leasehold property or the income thereof.

THE following facts are taken from the judgment:—

The testator by his will dated January 4, 1918, made provision as to his leasehold house and grounds, Wiseton Court, Bournemouth, upon which the first question on the summons turns. He disposes thereof as follows: "I bequeath my leasehold house garden and grounds known as Wiseton Court Cavendish Road Bournemouth aforesaid together with the fixtures and fittings and all my furniture pictures (except the pictures 'San Remo' already bequeathed by me to W. E. Oakeshott) china plate linen grand piano and all chattels and other effects therein to my trustees upon trust to permit my sister Emily Hawkins to reside in my said house after my death if she shall wish to do so and to have the use and enjoyment thereof during her life free of rent or other payment and I give to my said sister the use and enjoyment of my said house garden and grounds everything contained therein as aforesaid for her life accordingly and I direct my trustees after the death of my said sister or at any time during her life if and when she shall not wish to reside or continue to reside in my said house to sell the same (with the exception of the family portrait of Captain Acklom R.N. all family photographs and prints and all my china plate and linen and the grand piano in the drawing room all of which have been bequeathed to my said nephew Spencer Acklom or in

the event of his death in my lifetime then to my said nephew F. E. Acklom) with power to postpone such sale for such a period as my trustees without being liable to account may think proper and to divide the proceeds of sale between the principal Bournemouth and other charities of which I leave a signed list amongst my papers. During such postponement my trustees shall have full power to let the said house for a term not exceeding 12 calendar months at such rent and on such conditions as my trustees shall in their absolute discretion think fit and the net income produced by any such letting shall be added to the sum to be divided amongst the said charities." The testator died on June 26, 1918, and the sister entered into personal occupation of the house immediately. After his death—namely, on June 12, 1925—the lady lived abroad in the first instance temporarily and for the benefit of her health. At that time she went to France, and fully intended, as she says, to return after a month, and left the house with the gardener and the charwoman. Unfortunately she was prevented from returning as she had intended. Eighteen months ago she had a severe illness in the spring of 1926, and in consequence, being prevented from returning to England, she let the house from time to time, but continued to pay Sch. A tax thereon ; and from the evidence of one of the trustees it appears that the ground rent, insurance, gardener's wages and so forth were paid by the residuary legatee. Whether the payments of rates and repairs were made as from the death of the testator under the provisions of the will did not appear. [The Court however did not think the gardener's wages could prima facie fall upon the residuary legatee.] On June 29, 1927, Mrs. Hawkins purported, as the tenant for life or person having the powers of a tenant for life, to sell the leasehold premises to a purchaser for 4000*l.* The trustees then sold the contents other than certain excepted articles for 1000*l.*

Broughton for the trustees.

Bischoff for Mrs. Hawkins submitted that she had the powers of a tenant for life, which in the circumstances were properly exercised.

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Errington for one of the charities. If the lady had sold during her tenancy for life it would have been a good sale. It entirely depends on her having ceased to reside: *In re Haynes* (1), followed in *In re Trenchard.* (2) Here she had ceased to reside, and there was a forfeiture.

Sir A. Underhill supported this argument. There was no vesting deed executing the legal estate in this lady, and if she had no legal estate she was not able to exercise these powers, and the sale as tenant for life falls to the ground. If she ceased to reside before purporting to sell her attempt to do so could not re-establish in her the estate which ex hypothesi she had not.

M. Potter in the same interest for another charity.

Errington referred to *In re Wright.* (3)

Bischoff in reply. There had been no forfeiture. *In re Gibbons* (4) shows that in such a case as this the lady had the powers of a tenant for life. The evidence showed that when she was prevented from returning to this country owing to illness she let the property from time to time. Those were temporary lettings. She therefore had not ceased to reside. She was fully justified in selling as tenant for life, and is entitled to the income of the proceeds of sale. As to the furniture, the sale was by the trustees.

N. Daynes for the residuary legatee.

MAUGHAM J. [after stating the facts continued:] The questions which arise for determination are whether the defendant Emily Mary Hawkins has any and (if any) what interest in (*a*) the proceeds of sale of the leasehold property known as Wiseton Court, Bournemouth, and the income thereof; (*b*) the proceeds of sale of the contents thereof, which have been sold, and the income thereof. The first question to some extent is affected by particular authorities. There is no doubt at all that under s. 106 of the Settled Land Act, 1925, which applies to the provisions of wills made before or after the Act, a provision which limits or prevents

(1) (1887) 37 Ch. D. 306.
(2) [1902] 1 Ch. 378.
(3) [1907] 1 Ch. 231.
(4) [1920] 1 Ch. 372.

the tenant for life from exercising his power of sale is void. Accordingly it is reasonably clear to my mind in this case that if Mrs. Hawkins was in a position to exercise the powers of a tenant for life on June 29, 1927, a provision whereby the proceeds of sale should under the terms of the will pass to the charities is void. If authority were needed for that it would be found in *In re Paget's Settled Estates* (1); *In re Trenchard* (2); and *In re Gibbons.* (3) By parity of reasoning it cannot be denied that so long as Mrs. Hawkins was a person having the powers of a tenant for life she was entitled to let Wiseton Court without incurring any forfeiture even if she ceased thereupon to reside or to continue to reside within the meaning of the words contained in the clause I have read. The argument for the charities does not dispute this proposition. They maintain that on the evidence and in the events which happened Mrs. Hawkins must be taken to have ceased to reside or to continue to reside at a date considerably anterior to the sale, and accordingly that she had forfeited her interest in the property prior to the sale, and therefore that they are entitled to the proceeds of sale. Now the evidence as to this is unsatisfactory; but it is to be observed in the first place that the trustees in their affidavit, para. 12, say: "On the 29th June, 1927, the said Emily Mary Hawkins as tenant for life or having the powers of a tenant for life under the powers of the Settled Land Act, 1925, assigned Wiseton Court to a purchaser in consideration of the sum of 4000*l.*, which the plaintiffs have invested in the purchase of a sum of 3941*l.* 6*s.* 2*d.* 5*l.* per cent. War Loan, 1929–47." On the other hand it is true that for two years past Mrs. Hawkins had not lived there but abroad. I am not told for what period she let Wiseton Court, but I think I have to deal with the matter on the footing that she says in the words of her affidavit that she let the premises "from time to time." She continued to pay the Sch. A tax. So long as she continued to let in this way I am bound to come to the conclusion that by so doing she has not forfeited her interest. I have no evidence that at

(1) (1885) 30 Ch. D. 161. (2) [1902] 1 Ch. 378.
(3) [1920] 1 Ch. 372.

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any particular date it can be established that prior to the sale she had finally and irrevocably decided not only not to continue to reside, but not to let the house under her powers as tenant for life. The question of intention is affected by s. 106; and if a tenant for life or person entitled to possession, so long as he enjoys it, is careful to exercise the powers as under the Act so that s. 106 applies, the intention is wholly immaterial. I hold that Mrs. Hawkins was entitled temporarily to give up possession if it was for the purpose of exercising her powers under the Settled Land Act or of procuring a tenant or effecting a sale, and that on the evidence before me Mrs. Hawkins has so acted that the trustees had not the power of sale of the property. Of course it is material in that connection to bear in mind that they never purported to exercise any such power. They are to be presumed to have allowed her to sell without interference by any one. Accordingly I answer the first question by saying that she has not forfeited her interest in the proceeds of sale of the leasehold property. [The Court also held for reasons that need not be reported that the same result followed as to the other question.]

Solicitors: *Iliffe, Sweet & Co., for Wilkinson & Butler, St. Neots; Bridges, Sawtell & Co.; Coward, Chance & Co.; Geare & Son, for Wilkinson & Butler.*

A. W. C.

In re COLLINS.

TOWERS *v.* COLLINS.

MAUGHAM J.

1928

Nov. 1.

Law of Property—Transitional Provisions—Will—Construction—Settled Land—Entirety vested in sole Trustee for Life with Remainder to Persons in undivided Shares—Death of sole Trustee and Appointment of Executrix—Extent of Interest of Executrix—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV.*, 1 (1.) (*b*)—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 31.

By his will made on August 14, 1896, the above named testator nominated his wife, C. E. Collins, trustee and executrix, and gave, devised and bequeathed to her upon trust for her use and benefit the whole of his real and personal estate on condition that the children were properly cared for and the property kept in good repair, and at her decease the property was to be equally divided among his children.

He died on January 21, 1917. He had been twice married, (1.) to Emily Charlton, about 1872 (who died in 1881), by whom he had three children, who were defendants; (2.) to the said C. E. Collins, by whom he had also three children, the plaintiff and two defendants. The testator's property consisted of twelve freehold houses. After his death the widow continued to reside in one of the houses, and died on April 3, 1923, leaving a will, of which the plaintiff was sole executrix. On a summons taken out by her asking whether on the true construction of the will, and the events which had happened, the property was now vested in her as legal personal representative of the testator upon the statutory trusts for sale referred to in Sch. I., Part IV., of the Law of Property Act, 1925, or in the Public Trustee, or in whom the same was now vested:—

Held that, having regard to s. 31 of the Wills Act, 1837, the widow was legal owner of the land in trust for the persons entitled in undivided shares. Accordingly, in the events which had happened, the plaintiff as her executrix was under s. 1 of Part IV. of Sch. I. of the Law of Property Act, 1925, the person in whom the property now vested in trust for the six children in undivided shares upon the statutory trusts.

THE testator duly made his will in 1896, and thereby nominated his wife trustee and executrix thereof, and gave, devised and bequeathed to her upon trust for her use and benefit the whole of his real and personal estate on condition that the children were properly cared for and the property kept in good repair, and at her decease the same was to be equally divided among his children. He died in 1917, having been twice married, (1.) to Emily Charlton, who died in 1881, by whom he had three children, defendants, and (2.) to the

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trustee and executrix of his said will, C. E. Collins, by whom he also had three children, the plaintiff and two defendants. His property consisted of twelve freehold houses at Gillingham, Kent. After his death the widow continued to reside in one of the houses and received the rents, and died in April, 1923, leaving a will, of which the plaintiff was executrix.

This summons was now taken out by the plaintiff, in consequence of doubts and difficulties which had arisen, asking whether upon the true construction of the said will and in the events which had happened the property was now vested in the plaintiff as the legal personal representative of H. D. Collins upon the statutory trusts for sale by virtue of Part IV. of Sch. I. of the Law of Property Act, 1925, or whether it was vested in the defendant, the public trustee, upon the statutory trusts or in whom the same was vested.

Harman for the plaintiff. The question is whether the estate which came into existence on the passing of the Law of Property Act, 1925, was such that on the death of the widow she was tenant for life as well as executrix of the will. There was no distribution of property during her lifetime. She died on April 25, 1923. The estate, which consisted entirely of house property, became then divisible among the children of the testator. She went into occupation of one of the houses, and received the rents until her death. The condition of the will was that the property should be kept in good repair. The elder family contended that she had not done so. She left an estate of only 54*l.* By s. 31 of the Wills Act, 1837, she took the legal estate in the testator's property: *In re Dawson's Settled Estates* (1), and had the fee simple therein. Then by the Law of Property Act, 1925, Sch. I., Part IV. (1.), the legal personal representative of the last surviving trustee —that is the plaintiff—is trustee upon the statutory trusts.

H. S. G. Buckmaster for the elder family submitted that the plaintiff was not entitled to deal with the property by herself. She was not entitled to sell by reason of her representation. Sect. 8 of the Conveyancing Act, 1911 (now

(1) [1928] Ch. 421.

repealed) only related to powers given to the surviving trustee. There were no such powers here.

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MAUGHAM J. This case raises a curious little point. Mr. Collins died on January 21, 1917, having by his will nominated his wife sole trustee and executrix thereof. Then he gave and devised to her upon trust for her use and benefit all his real and personal estate upon condition that the children were properly cared for and the property kept in good repair, and at her death the same was to be equally divided among his children. She entered into possession of one house, and died on April 1, 1923, leaving a will, under which the plaintiff was her executrix. The property consisted of twelve houses, freehold, not of great value, at Gillingham in Kent, and the question which arises is under the Law of Property Act, 1925, s. 1, Part IV. of Sch. I., whether after the death of the widow and immediately before the commencement of the Act the entirety of the land remained "vested in trustees or personal representatives" in trust for "persons entitled in undivided shares." In other words, whether the plaintiff as legal personal representative of the sole trustee holds the land in trust for the persons entitled in undivided shares. I should have had great difficulty in coming to that conclusion on the construction of the will as it stands, but it seems to me that the matter is determined by s. 31 of the Wills Act, 1837. The section provides "that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied." In the present case, after the death of the tenant for life the will directed that it should be equally divided

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among his children. That did not involve a trust for sale, but it is I think impossible to come to the conclusion that the direction to divide does not involve that the purposes of the trust may continue beyond the life of the tenant for life. Accordingly I think that the whole legal estate was vested in Mrs. Collins and that if she had appointed other persons as trustees they would have had certain trusts to perform. In the event I am bound to hold that the plaintiff as executrix of the last surviving trustee was under Sch. I., Part IV., s. 1, of the Law of Property Act, 1925, the person in whom the property was vested in trust for the six children in undivided shares. Accordingly that section applies, and under sub-s. 1 (*b*) the land must be held by her upon the statutory trusts. The matter can stand over a short time to see if the parties can agree upon an appointment of new trustees.

The matter was mentioned to the Court on a later day, when it was stated that the beneficiaries, all of whom were of full age, had agreed on a division of the property.

Solicitors: *Berrymans, for Wallace Watson & Flint, Chatham; Strong & Co.*

A. W. C.

In re HOULDER.

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1928

Nov. 12, 13.

[61 of 1924.]

Bankruptcy—Proof—Principals and Sureties—Joint and several Covenant with Creditor—Bankruptcy of one Surety—Proof for whole Debt—Payments by other Sureties between Receiving Order and Proof—Non-reduction of Proof.

In August, 1921, two borrowers with three sureties borrowed 20,000*l.* from an insurance company. The loan was secured by the joint and several covenant of the borrowers and the sureties and by a mortgage and further charge on the borrowers' life policies. The loan was repayable by instalments spread over five years but, if a borrower or surety became bankrupt, it was immediately repayable.

On January 10, 1924, a receiving order was made against one surety, Houlder, on his own petition, and on January 25 he was adjudicated bankrupt.

At the date of the receiving order the amount due to the insurance company as creditors was 8000*l.* principal and 249*l.* interest, and on January 13, 1926, they put in a proof for that amount in Houlder's bankruptcy.

Between the date of the receiving order and the proof, however, the creditors had received some 5372*l.*, made up of 4910*l.* payments of principal and interest by the other sureties and 462*l.* credited ex gratia as the surrender value of the policies which had really lapsed.

The trustee in the bankruptcy applied to reduce the proof by 5372*l.*:—

Held, that as each surety was liable for the whole debt due at the date of the receiving order, the creditors were entitled to prove for the full amount in the surety Houlder's bankruptcy without giving credit for any sums received from the other co-sureties since that date, provided that they did not in the whole recover more than 20*s.* in the pound.

In re Blackburne (1892) 9 Mor. 249; *Midland Banking Co.* v. *Chambers* (1869) L. R. 4 Ch. 398; *In re Rees* (1881) 17 Ch. D. 98; and *In re Sass* [1896] 2 Q. B. 12 applied.

In re Blakeley (1892) 9 Mor. 173; *Ex parte Taylor* (1857) 1 De G. & J. 302; 26 L. J. (Bank.) 58; *Ex parte Cama* (1874) L. R. 9 Ch. 686; and *Commercial Bank of Australia* v. *Wilson's Assignee* [1893] A. C. 181 distinguished.

MOTION.

By a mortgage dated August 16, 1921, and made between Bowen and Inman, the mortgagors of the first part, Houlder, Dixon and Wells, the sureties of the second part, and the British Dominions Insurance Company, Ld., the mortgagees of the third part, it was witnessed that in consideration of the sum of 15,000*l.* paid to the mortgagors by the mortgagees

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at the request of the sureties, the mortgagors and the sureties jointly and severally covenanted with the mortgagees to repay the same with 6 per cent. net interest on February 16, 1922, and to pay interest at the same rate half-yearly so long as the loan remained unpaid. It was also witnessed that the mortgagors assigned a 10,000*l.* policy on Bowen's life and a 5000*l.* policy on Inman's life to the company by way of mortgage for securing the said loan, the mortgagors and sureties covenanting as aforesaid to pay the premiums. It was also provided that if the mortgagors should repay the principal sum of 15,000*l.* by half-yearly instalments of 1500*l.* on February 16 and August 16 in every year with interest on the part from time to time remaining unpaid and should pay the policy premiums, and the mortgagors and sureties all lived till all was paid and no mortgagor nor surety (inter alia) became bankrupt, the mortgagees would accept repayment by such instalments and would not enforce repayment of the principal sum at the time originally specified.

By a further charge dated August 31, 1921, a further advance of 5000*l.* was secured by a similar joint and several covenant and charge, and a further policy of 5000*l.* on Inman's life was assigned to the mortgagees as further security, with a similar provision and on similar conditions that the mortgagees would accept repayment by half-yearly instalments of 500*l.* on February 16 and August 16 in every year.

On January 10, 1924, a receiving order was made against the surety Houlder on his own petition of that date, and he was adjudicated bankrupt on January 25. Rabbidge was appointed trustee, and his appointment certified on January 28. On January 29 the mortgagees commenced an action [1924. E. 164] against the mortgagors Bowen and Inman and the sureties Dixon and Wells for the amount then due, and on March 5 they recovered judgment against Bowen, Dixon and Wells for 8000*l.* principal and 267*l.* interest.

At the date of the receiving order the amount due to the mortgagees was 8000*l.* principal and 249*l.* interest, and on January 13, 1926, the mortgagees put in a proof for the total 8249*l.*

At the date of the proof, however, the mortgagees had received some 5372*l.*, made up of payments of 4910*l.* principal and interest by the sureties Dixon and Wells, and a sum of 462*l.* credited ex gratia as the surrender value of the policies which had lapsed, and the question arose whether the proof ought not to be reduced by that amount, and stand at 2877*l.*

On July 13, 1928, the trustee issued this notice of motion to determine the point.

Stable for the trustee. The liability of the principal debtors and sureties is joint and several. One surety has gone bankrupt. Between the date of the receiving order and the creditors' proof the other sureties have paid about 5000*l.* Surely it must be deducted from the proof.

The form of proof (Form 60 of 1915) requires the creditor to state that the bankrupt at the date of the receiving order was "and still is" justly and truly indebted to him in the amount claimed by the proof.

The bankruptcy rule is stated quite generally in *Ex parte Taylor* (1) and *In re Blakeley* (2); but of course it does not apply to a payment by a third party not in privity with the bankrupt. For example, a lessor may prove in his lessee's bankruptcy for the full amount of damages under a covenant for reinstatement in case of fire without deducting the amount received from his own insurance office: *In re Blackburne.* (3) The suggestion by Vaughan Williams J. that the general rule is confined to negotiable instruments was wholly unnecessary to that decision, though of course the dictum is noted in the text-books, e.g., Williams on Bankruptcy, 13th ed., p. 161, where these authorities are summarized.

The question is really whether the moneys were received before or after the date of proof. If after, the proof stands. If before, credit must be given and the proof reduced accordingly: *Ex parte Cama.* (4)

The decision of the Privy Council in *Commercial Bank of Australia* v. *Wilson's Assignee* (5) turned entirely on the

(1) 1 De G. & J. 302; 26 L. J. (Bank.) 58.
(2) 9 Mor. 173.
(3) 9 Mor. 249.
(4) L. R. 9 Ch. 686, 689, 690.
(5) [1893] A. C. 181.

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question whether the deposit of 3000*l.* by the bankrupt's co-sureties amounted to payment of that amount. If the rule in question is really confined to negotiable instruments, the elaborate discussion of the agreement under which the deposit was made would have been quite unnecessary. The Privy Council clearly thought the rule would have applied if the deposit had been a payment. This is evidently the view of Kekewich J. in *Edwards* v. *Hood-Barrs* (1), though the actual decision relating to the liabilities of co-trustees for a breach of trust, if and so far as it is relevant, is against me.

Tindale Davis for the mortgagee creditors. The true principle is that in proving against a bankrupt's estate the creditor may disregard payments by third parties. Even if they have paid the creditor in full, he may still prove for the whole debt, which as between himself and the bankrupt, who has paid nothing, is still owing. The only limitation is that if the creditor recovers more than 20*s.* in the pound, he must hand the balance to the trustee: *Midland Banking Co.* v. *Chambers* (2); *In re Rees* (3); *In re Sass.* (4)

The exceptional rule in *Ex parte Taylor* (5) is clearly limited to negotiable instruments, under which head it is placed in Wace on Bankruptcy, p. 118.

Stable in reply. *Midland Banking Co.* v. *Chambers* (2); *In re Rees* (3); and *In re Sass* (4) were all cases where the sureties had waived their rights in favour of the principal creditor —namely, their rights to stand in his shoes in respect of the amount paid by them: Wace on Bankruptcy, p. 116; Williams on Bankruptcy, 13th ed., p. 160. Payments subject to such a waiver, like payments under a purely collateral contract, are not of course brought into account in the proof. There is no waiver of this sort in the present instrument. The mortgagors and the sureties are in full privity with themselves and the creditors. They are joint and several covenantors for a definite sum, and each is liable for the

(1) [1905] 1 Ch. 20, 22.
(2) L. R. 4 Ch. 398.
(3) 17 Ch. D. 98.
(4) [1896] 2 Q. B. 12.
(5) 1 De G. & J. 302; 26 L. J. (Bank.) 58.

whole debt: see *Ellis* v. *Emmanuel.* (1) If 10,000*l.* had been paid off by any of these joint and several covenantors the mortgagees could only have sued for the balance. Why should they have a higher right in bankruptcy?

ASTBURY J. [after stating the facts:] The question is whether the mortgagees can in these circumstances prove for the amount due at the date of the receiving order, or whether they can only prove for the net amount owing at the date of proof.

A large number of authorities have been cited on the point, which are by no means easy to reconcile. I do not, however, propose to discuss the authorities in the general sense at all. I propose to limit my judgment to the question of what is the proper amount for which a principal creditor is entitled to prove in the bankruptcy of a surety, as distinct from his right of proof in the bankruptcy of the principal debtor.

The trustee in an able argument submitted that this was a case where the mortgagees ought to be restricted to the debt due at the date of proof.

If between the date of the receiving order against the surety and the date of proof the creditors have received from the estate of the principal debtor moneys in reduction of their claim, it is clear that in the bankruptcy of the surety they can only prove for the amount owing at the latter date.

In *In re Blakeley* (2) the headnote states the rule as follows: "Where proof is made against a bankrupt's estate on a guarantee entered into by the bankrupt on behalf of another person, if at the time of proving the creditor has received part of the debt, either by payment or as a dividend from the estate of the principal debtor, or even if such dividend has been declared though not actually paid, such creditor will be allowed to prove for the residue only after deducting the amount so paid or declared. But if after proof is made the creditor receives a dividend from the estate of the principal debtor that will not be deducted from the amount of his proof."

(1) (1876) 1 Ex. D. 157, 168. (2) 9 Mor. 173.

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In other words, where a creditor is proving in the bankruptcy of a surety and that surety is only responsible for the amount in fact owing by the principal debtor, any payment by or on behalf of the principal debtor before proof must be taken into account.

Where, however, the creditor has received from some other source payments in reduction of the principal debtor's debt between the receiving order and the proof the position is different.

In *In re Blackburne* (1) Vaughan Williams J. said: "The second point raised is that sometimes a person seeking to prove has to give credit for a sum of money received not from the bankrupt's estate but from elsewhere. The case of a bill of exchange was mentioned, and it was said that according to the practice in bankruptcy when several parties are liable on a bill of exchange, and proof is made against the estate of one of those parties, if a sum has been received from another party before proof is made that sum must be deducted from the proof. The answer to that is, that although it is true there is such a rule, it is a rule which applies to bills of exchange and negotiable instruments alone."

The trustee questions the accuracy of this view and suggests that the right to reduce the proof in such a case is not limited to negotiable instruments but is of general application. This is one of the questions I have to decide.

The trustee relies on *Ex parte Taylor* (2), which was a bill of exchange case. I will read it from the Law Journal report which I have before me. The headnote is as follows: "The holder of a bill of exchange received from the drawers payments in respect of it amounting to nearly 15*s*. in the pound. The acceptor afterwards became bankrupt, and upon the holder tendering a proof against the estate for the full amount of the bill and interest in arrear, the proof was cut down to the amount of principal money due at the time of the proof." Knight Bruce L.J. said: "Still the fact remains here, that the appellants have actually received sums of money on account of the bill of exchange after it reached

(1) 9 Mor. 249, 252. (2) 1 De G. & J. 302, 306; 26 L. J.(Bank.) 58, 60.

maturity. According to the general rule of bankruptcy, (which I think a wholesome and rational rule,) the appellants are not entitled to prove for more than the balance remaining, after deducting the sums so received by them from persons liable to them either directly or indirectly; and to me there appears no ground for making the present case an exception (if, indeed, there can be under any circumstances an exception) to this general rule, the payments having been made by reason of the liability of the person making the payments as a party to the bill."

It is true that this judgment treats the matter generally, and does not state that the general rule in bankruptcy is confined to negotiable instruments. But it was in fact a case relating to a negotiable instrument, and it was only decided that the rule stated by Vaughan Williams J. applied.

The trustee then relied on *Ex parte Cama.* (1) That again was a bill of exchange case. It related to bills of exchange and the method of proving in respect of them, and it does not touch the present point.

The trustee then relied on *Commercial Bank of Australia* v. *Wilson's Assignee.* (2) There again the actual decision has no bearing on the present case, but there are expressions in the Privy Council's judgment which justify the argument that they intended to convey their view that in cases not relating to negotiable instruments payments by one surety in reduction of debt might have to be taken into account in proving against another surety. But there was no direct decision to that effect.

The trustee then properly referred to *Edwards* v. *Hood-Barrs* (3), which he admitted was against him. This was, however, not a question of suretyship, but as to the liability of trustees for a breach of trust, and I am unable to find anything in it that bears on the present point, or that helps either side.

These authorities are summarized with great accuracy in Williams on Bankruptcy, 13th ed., p. 161, as follows:

(1) L. R. 9 Ch. 686. (2) [1893] A. C. 181.
(3) [1905] 1 Ch. 20, 22.

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"The holder of a bill of exchange is entitled to prove his debt in the bankruptcies of all the prior parties to the bill, and to receive a dividend from each upon his whole debt, provided he do not in the whole receive more than 20*s.* in the pound. But where a creditor applies to prove his debt after having received a part, he can only prove for so much as remains unpaid; and this is true not only if he has actually received a part of the bill before proof, but even if a dividend under another bankruptcy has been declared: *Cooper* v. *Pepys* (1); *Ex parte Wildman* (2); *Ex parte Taylor.* (3) But this rule only applies to negotiable instruments: *In re Blackburne* (4), and, even in the case of these, if, after having proved for the whole, he receives a part from any person liable, he is entitled to a dividend upon the whole, provided it do not exceed 20*s.* in the pound upon such part as remains due: *Ex parte Taylor* (3); *Ex parte Wildman* (2); *Ex parte Cama.* (5)"

I will now come to the facts of the present case. It has no relation to negotiable instruments. It is a pure question of principal and surety, and I shall base my decision on that ground alone. The authorities on the right of proof in principal and surety cases are quite clear. If the instrument of guarantee is of such a character as to make the sureties liable for the whole debt, then whether or not the actual liability of the surety to the creditor is limited, the creditor can prove for the whole debt.

I will now refer shortly to a few of the authorities relied on by the mortgagees.

In *Midland Banking Co.* v. *Chambers* (6) the headnote is as follows: "A bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of 300*l.*, which guarantee provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should

(1) (1741) 1 Atk. 106.
(2) (1750) 1 Atk. 110.
(3) 1 De G. & J. 302; 26 L. J. (Bank.) 58.
(4) 9 Mor. 249.
(5) L. R. 9 Ch. 686.
(6) L. R. 4 Ch. 398.

apply to and secure any ultimate balance that should remain due to the bank."—The result of that was that the surety guaranteed the whole overdraft.—" The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bankruptcy. His banking account was overdrawn 410*l.* The mortgage was realised, and the surety paid the bank the 300*l.* secured by it."—Stopping there, the case can be treated as one in which the surety guaranteed the whole debt, and had paid the principal creditor the amount to which his liability was limited.—" Held (affirming the decree of Malins, V.-C.), that the bank was not restricted to proof for the balance of 110*l.*, but was entitled to receive dividends on the whole 410*l.*, not receiving in the whole, including the 300*l.*, more than 20*s.* in the pound."

That appears to me to be a decision affirming the proposition that in a principal and surety case, a creditor who receives payments otherwise than from the principal debtor can prove for his whole debt in the surety's bankruptcy so long as he does not get more than 20*s.* in the pound.

In re Rees (1) was again a principal and surety case. A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint and several bond for 1000*l.* of himself and a surety, the liability of the surety being expressly limited to 500*l.* There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of 500*l.*, or so much thereof as should, together with the dividends, amount to 20*s.* in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, and the bankers proved for the debt due to them. Afterwards the surety paid the bankers 500*l.*, and he then proved in the liquidation for 500*l.*

(1) 17 Ch. D. 98, 103.

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Bacon C.J. held that the bankers' proof must be reduced by 500*l.*, but that this reduction would not prejudice their right against the surety. The Court of Appeal, however, held that the bankers were entitled to retain their proof for the full amount. Cotton L.J. said: "I think, especially having regard to the proviso, that this must be taken to be a bond, not for part of the debt, but to secure payment of the ultimate balance. The proviso clearly points out that that is so, that the surety is not to take advantage of any payments made from time to time by the principal debtor, but is to be liable, though not to a greater extent than 500*l.* Therefore he is not entitled to hold the bank as accountable to him for any dividend they may receive from the principal debtor's estate, or to expunge part of their proof."

In *In re Sass* (1), again a principal and surety case, the trustee's authorities were all cited, and the matter is set completely at rest, so far as the present case is concerned. In that case, a surety guaranteed a bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from their customer Sass, but nevertheless the total amount recoverable from the surety was not to exceed 300*l.* The guarantee was to be a continuing security, and any dividends which the bank might receive on the bankruptcy of Sass were not to prejudice their right to recover from the surety to the full extent of the guarantee any sums which after the receipt of such dividends might remain owing to them by Sass.

Sass became bankrupt, and the bank, after receiving the 300*l.* from the surety, claimed to prove in the bankruptcy for the full amount due to them from Sass. The trustee in bankruptcy contended that the proof ought to be reduced by the amount the bank had received from the surety. Vaughan Williams J. held that the bank were entitled to prove for their whole debt without any deduction. He said: "I think that the common law right of the bank here was to sue the debtor for the whole amount that was due from him to them, irrespective of the sum which was paid by the surety,

(1) [1896] 2 Q. B. 12, 14.

unless that sum amounted to 20*s.* in the pound. When bankruptcy supervened the right of the principal creditor —the bank—was to prove for that amount, unless there was a surety and that surety was a surety for a part of the debt [only]. . . . . Now for the purpose of this guarantie all I have to determine here is, whether, as between the bank and the surety, the surety became a surety for the whole of the debt or for a part. In my judgment the surety here became a surety for the whole of the debt. It is true that his liability was to be limited; but still, notwithstanding that, his suretyship was in respect of the whole debt, and he, having paid only a part of that debt, has in my judgment no right of proof in preference or priority to the bank to whom he become guarantor. I should have said that myself upon the first paragraph in this guarantie; but if there was any doubt about it, it seems to me that the last clause is also amply sufficient, either by itself or in conjunction with the earlier parts of the guarantie to show that, as between the bank and the surety, the bargain was that the bank should have the benefit of all sums paid by the debtor whether by way of dividend or otherwise, and of all securities held by the bank against the debtor's liability, until the whole amount of the debt due from the debtor to the bank was discharged; and that it would have been manifestly wrong on the words of this guarantie to hold that the surety could, as against the bank, get any right to dividend or security or anything else by reason of the payment of this part of what was to be treated, as between him and the bank, as the whole debt, unless and until the bank had received every sixpence of the full debt."

If the facts of the present case bring the matter within *In re Sass* (1) it is a complete authority against the trustee.

The trustee contends that the present mortgage deed does not bring the case within the ambit of *In re Sass.* (1) That is not accurate. It is true that in the present case the mortgagors paid next to nothing. But they were principal debtors borrowing from creditors and guaranteed by three

(1) [1896] 2 Q. B. 12, 14.

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sureties, one of whom has become bankrupt. There is no doubt that the three sureties were jointly and severally liable for the whole debt, and in my opinion the mortgagee creditors are entitled to prove for the whole amount due at the date of the receiving order.

On these grounds the trustee's motion fails and must be dismissed, but as this rather difficult matter had to be decided the right order will be to allow the costs of both parties out of the assets.

Solicitors: *Coward, Chance & Co.; Capron & Co.*

G. R. A.

ROMER J. 1928 *Nov.* 28.

In re NATIONAL UNION OF SEAMEN.

WILSON *v.* NATIONAL UNION OF SEAMEN.

[1928. N. 711.]

Trade union—Rules—Objects—Ultra vires—Provision of funds for non-political trade union—Trade Union Act, 1913 (2 & 3 *Geo.* 5, *c.* 30), *ss.* 1, 2.

The rules of the National Union of Seamen (a registered trade union) declared one of its objects as follows: "To promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations of trade unions as, in the opinion of the executive council, may appear desirable":—

Held, that the union had power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners.

SUMMONS.

The National Union of Seamen was a registered trade union. One object of the union, as defined by the rules, was as follows: "Rule III. (1.)—To promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations of trade unions as, in the opinion of the executive council, may appear desirable."

This summons was taken out by the general treasurer of the union for the determination by the Court of the question

whether the union had power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners.

Luxmoore K.C. and *Ronald F. Roxburgh* for the applicant. The statutory objects of a trade union are defined by s. 1 of the Trade Union Act, 1913 : see Slesser and Baker on Trade Union Law, 3rd ed., p. 135. The rule should not be construed in any way with reference to the name of the union, for the name of the union does not restrict its objects : see *Cotman* v. *Brougham*. (1) If the union makes a gift or loan to a non-political trade union, such a gift or loan is for the extension of trade union principles. There is nothing illegal or improper in so doing. In any case a contribution to a trade union closely connected with the particular trade of the union which provided the money would be in furtherance of trade union principles. There is evidence that, in the present case, such a gift or loan is well within the rule, as a close connection between miners and seamen is necessary. The whole question turns on the wording of the objects clause. The question whether any particular trade union should be supported or not is a question of policy and not of principle.

Henry Everett for the respondent union.

G. B. Hurst K.C. and *R. J. White* for a member of the union representing a class. The provision of funds to promote the establishment and growth of non-political unions among miners is not sufficiently closely or directly connected with the objects of the union to be intra vires. The meaning of the phrase " trade union principles " must first be ascertained. It has a definite meaning having regard to the " statutory objects " as defined in s. 1, sub-s. 2, of the Trade Union Act, 1913. It means the support of the workers' interests in relation to the statutory objects of trade unions. The objects of trade unions do not include politics. They also, equally truly, have nothing to do with abstinence from politics. Objects which may remotely influence for good the fortunes of a limited company or trade union have been held to be

(1) [1918] A. C. 514, 521.

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ultra vires because they are not sufficiently directed to or closely connected with either the memorandum of association in the case of a company or the rules of a union in the case of a trade union : see *Tomkinson* v. *South Eastern Ry. Co.* (1) ; *Osborne* v. *Amalgamated Society of Railway Servants.* (2) The object of a loan or gift to one of these non-political unions is, as is clearly shown by the evidence in support of this summons, the furtherance of the cause of abstinence from politics as distinguished from the cause of participation in politics. This has nothing to do with trade union principles, and is ultra vires.

ROMER J. The summons asks whether the plaintiff union has power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners. Prima facie the answer to that question must be found in the rules of the union. But, before referring to those rules, it is desirable to call attention to the Trade Union Act of 1913, which enables trade unions, so long as they are formed for the purposes of carrying into effect what in the Act are called statutory objects, to take power to carry out any other transaction which is not in itself illegal. By s. 1, sub-s. 1, of that Act it is provided as follows : " The fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of this Act shall not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871 to 1906, so long as the combination is a trade union as defined by this Act, and, subject to the provisions of this Act as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution."

Then sub-s. 2 of that section says what is meant by the phrase " statutory objects," and enacts : " For the purposes of this Act the expression ' statutory objects ' means the objects mentioned in section sixteen of the Trade Union

(1) (1887) 35 Ch. D. 675. (2) [1909] 1 Ch. 163, 191.

Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members." By s. 2, sub-s. 1, the expression "trade union" for the purpose of the Trade Union Acts is defined as meaning any combination the principal objects of which are under its constitution statutory objects.

Now, the National Union of Seamen is a registered trade union, and without any question has been formed for the purpose of carrying into effect the statutory objects. That being so, anything not in itself unlawful which it takes power to do by its rules cannot be said to be ultra vires the trade union.

With those preliminary observations I now refer to the rules of the society. Rule III. states the objects of the union, and the first of those objects, and, indeed, the only one with which I am concerned on this summons, is this: "(1.) To promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations, of trade unions, as, in the opinion of the executive council, may appear desirable." Mr. Hurst says, and I agree with him, that the phrase, "trade union principles," there used, is referring to the statutory objects of trade unions. But, accepting that, it appears to me impossible to say that it would be ultra vires this union to promote or to provide funds for the promotion of any trade union amongst any particular class of workers, seeing that a trade union would necessarily have among its objects the statutory objects. Supposing, for instance, that there was a body of workmen for whom no union had been provided, could it possibly be said that it was ultra vires the Seamen's Union to promote the establishment of a trade union for those workers? The answer to that, it appears to me, must necessarily be in the negative. It is impossible to say that that would not be within Rule III., sub-r. 1, of the rules of this union.

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If, therefore, the question put to me were whether the union has power under its rules to provide funds to promote the establishment and growth of trade unions among miners' the answer would be in the affirmative. But if it is not ultra vires the trade union to promote the establishment and growth of trade unions among miners, it cannot be ultra vires for them to promote the establishment and growth of trade unions among miners which have a certain complexion.

In my opinion, when once it is conceded, as I think it must be conceded, that to promote the establishment of a trade union among miners is within the powers of this union, it is impossible to say that it is not within their powers to provide funds for the establishment of trade unions which have this particular feature that they are non-political. The reasons for selecting non-political unions, are set forth in an affidavit made by the treasurer of the union, and I am satisfied that in so doing the union are bona fide endeavouring to extend the adoption of trade union principles within the meaning of r. III., sub-r. 1.

There will, therefore, be a declaration that the defendant union has power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners.

Solicitors: *Vizard, Oldham, Crowder & Cash; Daphnes.*

J. L. D.

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June 12, 13, 14, 26.

In re PINTO LEITE AND NEPHEWS.

Ex parte VISCONDE DES OLIVAES.

[331 of 1926.]

Bankruptcy — Proof — Creditor Sharing Profits — Postponement of Proof in Favour of other Creditors—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-s.* 3 (*d*); *s.* 3—*Right of Trustee to set off against Assignee of a Debt due from the Bankrupt a Debt due to him from the Assignor—Debt assigned payable in futuro—Debt of Assignor not debitum in praesenti at Date of Notice of Assignment.*

A creditor for a sum of 100,000*l.* of a firm of merchant bankers in May, 1918, agreed with the debtors to leave the debt on deposit with them until January, 1932, at interest, with commission to be paid to nominees of the creditor—namely, O. and his family; and it was further agreed that O. should be credited with a share of the firm's profits, which in fact he subsequently drew from the firm. In July, 1920, the debt was, by the direction of the creditor, transferred in the books of the debtors to F., who agreed with the debtors to leave the debt on deposit with them, until January, 1932, upon the conditions expressed in the former agreement, as if F.'s name had been inserted therein instead of the name of the original creditor. On February 24, 1926, F. transferred the debt in equity to O., and on March 2, 1926, the debtors had notice of that assignment. On March 15, 1926, a receiving order was made against the debtors on their own petition, and shortly afterwards they were adjudicated bankrupts. Between March 2, 1926, and the date of that order F. became indebted to the firm in the sum of 15,000*l.* for moneys expended by the firm between those dates in taking up accommodation bills drawn by F. on and accepted by the firm, for which, as between F. and the firm, F. through not having supplied the necessary funds, was liable, F.'s liability arising in every case from contractual liabilities undertaken by F. towards the firm at dates earlier than March 2, 1926.

Upon the questions raised on the motion of the trustee in bankruptcy, whether O. was entitled to prove pari passu with the other creditors of the debtors for the 100,000*l.*; and, if so, whether the trustee was entitled to set off against that debt the 15,000*l.* which became due after receipt of notice of the assignment but before the 100,000*l.* became payable:—

Held, first, that upon the proper construction of the agreement of May, 1918, the original creditor did not advance money to the debtors on a contract that she should receive a share of the profits of their business within the meaning of s. 2 (*d*) of the Partnership Act, 1890, with the result that O.'s proof for the 100,000*l.* was not liable to be postponed under s. 3 of that Act to the claims of the other creditors; secondly, that, even though the 100,000*l.* debt against which the right of set-off was claimed was a debt not payable until a date subsequent to the notice to the debtors of the assignment and one for which the

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assignors were not at that date entitled to sue, and although the liability out of which the debt sought to be set off existed at or before the date of the notice of the assignment, yet, as that debt had not then accrued due, it was not then debitum in praesenti, and was not a debt which the trustee was entitled to set off.

Jeffryes v. *Agra and Masterman's Bank* (1866) L. R. 2 Eq. 674 discussed and the principle deducible therefrom applied—namely, that, where the debt assigned is at the date of notice of the assignment payable in futuro, the debtor can set off against the assignee a debt which becomes payable by the assignor to the debtor after notice of assignment but before the assigned debt becomes payable, only if the debt so to be set off was debitum in praesenti at the date of notice of the assignment.

MOTIONS in the bankruptcy of a firm known as Pinto Leite & Nephews.

The facts, taken from the judgment of Clauson J., are as follows :—

In May, 1918, the firm, then consisting of Count Jose Pinto Leite, his father, Julio Pinto Leite, and Henry James Glanville, were carrying on a merchant banking business in London. The firm had originally been founded in 1851 by Count Sebastian de Penha Longa, who died in 1892, leaving him surviving a widow (hereinafter referred to as "the Countess"). At the time of his death he and Mr. Glanville were partners in the firm, Mr. Glanville's interest being a very small one. Count Sebastian by his will left his interest in the firm and the firm's assets to his great nephew Jose Pinto Leite, who thereupon entered into partnership in the business with his father, Count Julio, and Mr. Glanville. The Countess, however, established in the Portuguese Courts a claim to one-half of Count Sebastian's property notwithstanding his testamentary dispositions, with the result that the firm, by way, as it would seem, of satisfying her claim on her husband's estate, opened an account in the London books to her credit of the amount of 190,000*l.* or thereabouts, and acknowledged her right to certain stocks and shares in their hands of the value of upwards of 40,000*l.* Between 1895, when this account was opened, and May, 1918, the Countess withdrew some of the moneys standing to her credit. The Visconde des Olivaes was a brother of Jose Pinto Leite and a son of

Count Julio, and was a partner in the firm from the year 1899 until the end of the year 1913. He retired from the firm on the terms of an agreement executed in November, 1914, and in May, 1918, he was no longer, at all events ostensibly, a partner in the firm.

By May, 1918, the Countess reduced her account with the firm to the round sum of 100,000*l.*, and on May 30, 1918, an agreement was entered into between her and the firm, the material terms of which were as follows: The Countess agreed to leave the 100,000*l.* on deposit with the firm for fifteen years as from January 1, 1917, at interest of 5 per cent. per annum, and commission at the rate of 1 per cent. per annum, the commission (by the Countess's request given by the agreement) to be paid to the Visconde, or in the case of his death before the termination of the contract to be paid to his surviving family, half to his wife and half to his children, the Countess to have the right to withdraw certain sums on notice, but not more than a total of 20,000*l.* during the whole term of fifteen years. At the end of the term the balance was to be repayable in half-yearly instalments of 8000*l.*, the firm having an option after the fifteen years of paying off the whole or part of the deposit in sums of not less than 8000*l.* at any one time. If the Visconde should be living twelve months after the end of the war the firm were to admit him as a partner, he to receive 7/40ths of the profits subject to a retention in favour of the firm of part of those profits to liquidate certain liabilities of the Visconde to the firm. The firm undertook to credit the Visconde as from January 1, 1917, with 7/40ths of any profits made from that date onwards which the firm might from time to time divide among the partners. The Visconde never in fact claimed the right to be admitted under this agreement to partnership in the firm, but he did in the years 1918, 1919 and 1920, and to some extent in 1921, draw from the firm the 7/40ths share of profits mentioned in the agreement. Since 1921 there had been no profits.

In July, 1920, the 100,000*l.* deposit was by direction of the Countess transferred in the firm's books from her name

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into the name of Fonseca & Aranjo, Ld., a Portuguese limited company, and an agreement dated July 19, 1920, was entered into between that company (hereinafter referred to as "Fonseca") and the firm, under which Fonseca agreed to leave the 100,000*l.* on deposit with the firm until January 1, 1932, upon the conditions in all respects as set forth in the agreement of May 30, 1918, and Fonseca and the firm mutually undertook as from July 19, 1920, to perform the conditions and agreements contained in the document of May 30, 1918, in all respects as if the name of Fonseca had originally been inserted therein instead of the name of the Countess.

In the year 1921 the securities held by the firm on behalf of the Countess were in part realized, and the balance was with her consent transferred in the firm's books to Fonseca. There was no document in writing governing the terms on which those securities were held by the firm, but it was agreed that as between the firm and Fonseca the firm were authorized to pledge the securities for their own purposes.

On September 17, 1921, the Countess died. It was not disputed that according to Portuguese law the effect of her testamentary dispositions was to give the Visconde and his children full power to deal with the whole of the Countess's estate, including the 100,000*l.* and the securities. Whatever the exact rights may have been as between Fonseca on the one hand and the Visconde and his children on the other, the firm, until March 2, 1926, with the acquiescence of the Visconde, and his children, treated Fonseca as the real owners of the 100,000*l.* deposit, and dealt with the interest and commission payable in respect of the deposit in accordance with Fonseca's directions, which in fact from time to time authorized the firm to pay this interest and commission to the Visconde.

In February, 1925, Fonseca, at the Visconde's request, directed the firm to hold the securities for the Visconde, and they were accordingly on February 26, 1925, transferred to the credit of the Visconde in the firm's books.

In the year 1925 things were not going well, either with the firm or with Fonseca. The Visconde, who was conducting

a merchant's business of his own in Lisbon, was becoming uneasy as to the position, and was minded to require Fonseca to transfer to him (as they would apparently be bound, as between themselves and him, to do at his request) their rights against the firm in respect of the 100,000*l.* deposit. Early in 1926, by reason of various bill transactions between Fonseca and the firm, the firm either had or looked forward to having various cross-claims against Fonseca.

The acting directors of Fonseca on February 24, 1926, met the Visconde in Lisbon, and the Visconde pressed them to direct the firm to transfer into his name the 100,000*l.* deposit. It was proved that at this meeting those directors on behalf of Fonseca agreed with the Visconde to give the necessary authority to the firm to transfer the deposit in their books to the credit of the Visconde. In other words, at that meeting the debt was made over by Fonseca to the Visconde; and although no formal assignment took place the effect of what occurred was (as Clauson J. held on the authority of *Brandts Sons & Co.* v. *Dunlop Rubber Co.* (1)) to transfer the debt in equity to the Visconde; and in view of the position which existed between the Visconde and Fonseca the transfer was binding and effective as between them. Shortly after that interview one of those directors returned to Oporto and was taken ill. The other director was sent for to Oporto, which was the place at which the Fonseca business was carried on, and, in pursuance of his instructions, a certain shareholder in Fonseca cabled on behalf of Fonseca to the firm in London a message in these terms: "Please transfer to the credit of Visconde des Olivaes deposit 100,000*l.*" Mr. Glanville, the partner in London, who was administering the affairs of the firm in London, thereupon made entries in the firm's books transferring 100,000*l.* from the credit of Fonseca to the credit of the Visconde. The effect of that message was (as Clauson J. further held) that on March 2 the firm received notice of the equitable assignment of the debt to the Visconde, and

(1) [1905] A. C. 454, 462.

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thereafter, as between Fonseca, the Visconde and the firm, the assignment of the debt to the Visconde was complete.

On March 2, 1926, Fonseca was indebted to the firm in a sum of 10,000*l.* in respect of moneys expended prior to that date by the firm in taking up accommodation bills for which as between Fonseca and the firm Fonseca was liable, Fonseca having failed to provide the necessary funds. Between March 2 and 15 Fonseca became indebted to the firm in the sum of 15,000*l.* for moneys expended by the firm between those dates in taking up bills (apparently accommodation bills) drawn by Fonseca on and accepted by the firm, for which, as between Fonseca and the firm, Fonseca were liable, Fonseca not having supplied the necessary funds; the liability of Fonseca in respect of that 15,000*l.* arising in every case from contractual liabilities undertaken by them towards the firm at dates earlier than March 2, 1926.

On March 15, 1926, the firm presented their petition for a receiving order, which was made on the same day, and the firm was adjudicated bankrupt on April 13 following. The immediate reason for the receiving order was the failure of Fonseca to carry out their obligation to provide funds for bills on which the firm were liable.

On April 7, 1926, the Visconde lodged his proof against the bankrupts' estate for the 100,000*l.* debt and for the amount of the securities, and on September 20, 1926, his proof to the extent of the 100,000*l.* was rejected.

On October 8, 1926, the Visconde gave notice of motion by way of appeal from the rejection of his proof by the trustee; and there was a counter notice of motion by the trustee asking for a declaration that the Visconde was not entitled to prove against the estate of the bankrupts for the debt of 100,000*l.* or for the amount of the securities, and that his proof in respect of the latter might be expunged; or, in the alternative, that the Visconde was not entitled to receive any dividend from the bankrupts' estate in respect of his proof, until the claims of the other creditors of the bankrupts for valuable consideration had been satisfied. A declaration was also claimed that at the date of the receiving order and

at all material times the Visconde was a partner in the firm of Pinto Leite & Nephews.

At the hearing of the motions it was contended, in the first place, by the trustee in bankruptcy that the Visconde was not entitled to prove pari passu with the other creditors for the 100,000*l.* debt on the ground (inter alia) that he was a partner in the firm, but Clauson J. held that on the evidence before the Court there was no foundation for the contention that in 1926 the Visconde was a member of the firm.

With regard to the securities specified in the trustee's notice of motion, it is sufficient to state that they were pledged by the firm, and, as between them and the Visconde, quite properly pledged. Some were realized by the pledgees; and it was not disputed that the securities retained in the hands of the firm's trustee were the property of the Visconde or that the Viscount was a creditor for the value of the securities realized.

Stuart Bevan K.C. and *Kenelm Preedy* for the Visconde. First, the applicant is entitled to prove for the full amount of the 100,000*l.* pari passu with the other creditors. His right is not liable to be postponed in favour of other creditors under s. 3 of the Partnership Act, 1890. Upon the proper construction of the contract between the firm and the Countess, the Countess thereby secured the payment of a share of profits to the Visconde and not to herself. She was not a lender on the terms that she should receive a share of profits; the contract was not such a contract as is referred to in s. 2, sub-s. 3 (*d*), of that Act. Further, the applicant founds his claim to prove upon the contract made on July 19, 1920, between Fonseca and the firm. His title to the debt is as the assignee of Fonseca, who by that contract agreed to redeposit with the firm the 100,000*l.* which the firm had on the same day, at the request of the Countess, transferred to Fonseca. The firm, by accepting notice of the assignment to the Visconde and substituting his name as creditor in their books, must be taken to have assented to the prior arrangements come to between the Countess and Fonseca and between

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Fonseca and themselves and to the assignment to the Visconde. The effect of the whole transaction was to substitute the Visconde as creditor for the 100,000*l.* in the place of Fonseca. Secondly, the trustee has no right to set off the 15,000*l.* debt against the claim of the applicant. True the 100,000*l.* debt assigned was a debt payable in futuro, but the crucial date is the date of the notice of the assignment, March 2, 1926. Although, when the applicant took an assignment of the debt, he took it subject to all existing equities, there was not at the time of the notice of the assignment any right of set-off in the firm, because the debt due to the firm from Fonseca did not accrue due until after notice of the assignment; it was not then debitum in praesenti, although it is true that it resulted from a liability which existed before the date of the notice: *Watson* v. *Mid-Wales Ry. Co.* (1); *In re Taunton, Delmard, Lane & Co.* (2) The fact that the debt, the subject of the assignment, was not payable until a future date—solvendum in futuro—does not weaken the position of the applicant. True in *Jeffryes* v. *Agra and Masterman's Bank* (3) it was held that only those sums could be set off against the debt assigned which were actually due at the time when that debt became payable, yet the decision did not turn on that point, but on the principle that the debt which it is sought to set off must have matured before notice of assignment. Moreover the debt assigned in that case can be distinguished from the present one, as it was a debt payable on a contingency.

Edward Clayton K.C. and *Stable* for the trustee. According to the true construction of the contract of May, 1918, the 100,000*l.* was advanced by way of loan to the firm upon the terms that the lender should receive a share of profits within the meaning of s. 2, sub-s. 3 (*d*), of the Partnership Act, 1890. Any claim by the Countess as creditor or by any one claiming under her is liable to be postponed to the claims of other creditors under s. 3 of that Act. The crucial date is the date of the contract between the firm and the Countess.

(1) (1867) L. R. 2 C. P. 593. (2) [1893] 2 Ch. 175.
(3) L. R. 2 Eq. 674.

The contract provided that the Countess, the lender, should be credited with 7/40ths of the profits. The consideration moved from the Countess and not from the Visconde. The Countess was entitled to a share in the profits in the name of the Visconde.

[CLAUSON J. If the firm paid to the Visconde in accordance with the Countess's mandate, on what principle could the Countess have been entitled to sue the firm for breach of contract ?]

The Visconde could not enforce payment of the profits against the Countess, as there was no irrevocable gift of them to him.

[CLAUSON J. On the construction of the contract with the Countess the Visconde was to have the beneficial interest in the profits. If the Countess had sued the firm for not paying the profits to her the firm would have had a good defence.]

The beneficial right to receive the profits was in the Countess, until she divested herself of that right. The Visconde was not in a position to sue upon the contract for the profits, as there was no consideration moving from him : *Tweddle* v. *Atkinson*. (1) In the alternative, there was a new contract in February, 1926, between Fonseca, the Visconde and the firm, in which the Visconde relent the money to the firm and became the lender upon the terms of the original contract with the Countess and entitled to a share of the profits ; and thus the case is again brought within s. 3 of the Partnership Act, 1890.

The firm is entitled to set off against the proof of the Visconde the two sums of 10,000*l.* and 15,000*l.* owing by Fonseca, the assignor, to the firm. The Visconde, on the assignment of the debt to him by Fonseca, took it subject to all liabilities to which Fonseca was under to the firm and subject to all equities. The firm were clearly entitled to set off against the claim of the Visconde the 10,000*l.* actually due to them from Fonseca on March 2, 1926, the date when they had notice of the assignment. When the debt was transferred in the books of the firm to the credit of the

(1) (1861) 1 B. & S. 393.

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Visconde, the firm did not waive any rights of set-off which they might then have against the assignor. Further, the firm have a right also to set off the 15,000*l.* which they expended between March 2 and March 15 on behalf of the assignor in respect of contractual liabilities of the assignor existing before March 2, 1926. Here, the debt assigned was not a debt payable at the date of the notice of its assignment, but was payable in futuro—namely, in 1932; and according to the principle of *Jeffryes* v. *Agra and Masterman's Bank* (1) the firm are entitled to set off the full amount which accrued due to the firm before the debt assigned matured, provided the amount set off were in respect of obligations incurred before the date of the notice of the assignment. In *Jeffryes* v. *Agra and Masterman's Bank* (1) only moneys actually due and payable at the time the "marginal receipts" became payable were allowed to be set off against the marginal receipts. We rely upon the principle of the decision in that case. The liability here, as in that case, accrued or arose before the date of the notice of the assignment.

Cur. adv. vult.

June 26. CLAUSON J. [stated the facts and continued:] The questions which I have to determine in this state of the facts are: first, whether the Visconde is entitled to prove pari passu with the other creditors of the firm for the 100,000*l.*, and secondly, assuming him to be so entitled, for what sums the trustee in bankruptcy is entitled to credit as against that sum; in other words, whether the trustee can set off the 10,000*l.* and the 15,000*l.*, which in the circumstances became due from Fonseca to the firm, as regards the 10,000*l.* before March 2, 1926, and as regards the 15,000*l.* between March 2 and March 15, 1926.

Upon the first point the contention of the trustee is, first, that the Visconde was a partner in the firm. [His Lordship then dealt with that first contention, and having held that the Visconde was not a partner proceeded as follows:] It is,

(1) L. R. 2 Eq. 674.

however, then said that by reason of the provisions of s. 3 of the Partnership Act, 1890, his proof for the 100,000*l.* must be postponed to the claims of the other creditors of the firm. The case is put in two alternative ways. First, it is said that the Countess was a person who had advanced money to the firm on a contract that she should receive a share of profits arising from the business, and that, accordingly, she could not claim her advance, except subject to the priority of the general creditors. On the construction of the document of May 30, 1918, it is, in my opinion, impossible to say that it is a contract which provides that the Countess should receive a share of the profits. It does not appear on the contract, nor is it a fact, that the payment of the profits to the Visconde was to be a payment to him as a mere agent or trustee for the Countess. The intention undoubtedly was that the Visconde should take the profits for his own use, and he did in fact so take them. It was pointed out by counsel for the trustee that there would have been a difficulty in the Visconde himself bringing any action for the profits: see *Tweddle* v. *Atkinson* (1), but I cannot see how this circumstance can be effectually relied upon for the purpose of bringing the Countess within the provisions of the Act. The Act might, of course, have been differently framed; but, as it stands, a creditor is postponed only if he advanced money on a contract that he should receive a share of the profits, and that cannot be predicated of the Countess. If, contrary to my view, the Countess would have had to be postponed to the other creditors had the claim been by her, it would, of course, have followed that Fonseca as a mere assign from her and the Visconde as an assign from Fonseca would equally have been postponed. The point was put alternatively in another way. It was said that the events of February and March, 1926, which I have already stated, amounted to this, that by a tri-partite agreement between Fonseca, the Visconde and the firm the liability of the firm to Fonseca was destroyed, and a new liability was brought into being between the firm and the Visconde to pay him

(1) 1 B. & S. 393.

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on the terms contained in the document of May, 1918, a share of the profits as a consideration of an advance of 100,000*l.* then treated as made by him in replacement of the 100,000*l.* which was treated as having been repaid to Fonseca. I find it quite impossible to infer any such contract from the facts before me. True it is that the firm recognized the Visconde as their creditor in place of Fonseca, and made the relevant entries or transfers in their books, but they did so, in my view, merely because they received notice of the transfer of Fonseca's rights to the Visconde, and they had not, in my view of the facts, any notion whatever of themselves entering into a new contract. In this view of the position the Visconde's right to prove in respect of the 100,000*l.* must be treated as established subject only to the question what, if any, are the amounts which the trustee in bankruptcy is entitled to set off as against that claim.

First, there is the sum of 10,000*l.*, which became due to the firm from Fonseca before March 2, when they received notice of the assignment of Fonseca's rights to the Visconde, being the amount which had before March 2, 1926, been paid in meeting acceptances for which, as between Fonseca and the firm, Fonseca was liable to provide the funds. I do not see how the right to make this set-off can reasonably be contested. The only argument against this set-off that I appreciated was that the transactions of February and March ought to be taken to amount to this, that the firm's liability to Fonseca was cancelled by agreement of the firm, and that a new liability for 100,000*l.*, clear from any antecedent right as against Fonseca, was created. True it is that on receiving notice of the transfer of Fonseca's rights to the Visconde Mr. Glanville transferred to the Visconde's credit in the firm's books in a new deposit account the 100,000*l.* which had previously stood to Fonseca's credit in their deposit account, and it may be that a transfer in the firm's books might, under some circumstances, be taken as evidence that the firm recognized the transfer as one which was to be free of cross-claims as between the firm and Fonseca, thus waiving their right of set-off. I cannot, however, in the circumstances,

satisfy myself that this was the true transaction. It appears to me that the entry made by Mr. Glanville was intended merely to record that Fonseca's rights in the deposit had been transferred to the Visconde, and I do not believe that Mr. Glanville had any thought or intention of waiving any then existing right or equity which the firm might have against Fonseca in regard to Fonseca's claim on the deposit. If, as I hold, the transfer of Fonseca's claim to the Visconde must be taken to have been subject to all such rights of set-off as at the date of notice of the transfer—namely, March 2—the firm had against Fonseca, the remaining question which arises, and it is one which has caused me considerable difficulty, is whether one of the rights of the firm against Fonseca to which the Visconde's claims are to be subject, is a right to set off the 15,000*l.* which, between March 2, 1926, and the commencement of the bankruptcy on March 15, 1926, was expended by the firm in taking up acceptances for which, as between Fonseca and the firm, Fonseca had become, before March 2, bound to provide funds. The principles applicable are those which apply in any case in which a chose in action is assigned. It is, of course, well settled that the assignee of a chose in action (and the Visconde is an assignee from Fonseca of this particular chose in action, that is the right on the terms stated in the document of May 30, 1918, to recover the 100,000*l.* from the firm) takes subject to all rights of set-off which were available against the assignor, subject only to the exception that, after notice of an equitable assignment of a chose in action, a debtor cannot set off against the assignee a debt which accrues due subsequently to the date of notice, even though that debt may arise out of a liability which existed at or before the date of the notice; but the debtor may set off as against the assignee a debt which accrues due before notice of the assignment, although it is not payable until after that date: see *Watson* v. *Mid-Wales Ry. Co.* (1); *In re Taunton, Delmard, Lane & Co.* (2)

Taking these familiar summaries of the principle which is to be applied, it would seem at first sight clear, and it is in

(1) L. R. 2 C. P. 593. (2) [1893] 2 Ch. 175.

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my opinion the fact, that the firm had no right to set off the 15,000*l.* against the Visconde. The liability of Fonseca to pay the 15,000*l.* to the firm arose out of a liability which I assume existed at or before March 2, the date of the notice, but the money became a debt from Fonseca only when, by reason of Fonseca's failure to provide the 15,000*l.*, the firm paid the 15,000*l.*; and this was at a date subsequent to March 2: see *Reynolds* v. *Doyle*. (1) On March 2, 1926, when the firm received notice of the assignment, the 15,000*l.* had not accrued due; it was not debitum in praesenti.

The case in favour of the set-off was, however, put by counsel for the trustee in this way. While accepting, as I understood, the principle to be as I have stated it, he suggested that the cases in which the principle has been thus accepted were all cases in which the chose in action assigned consisted of a debt payable by the debtor at or before the date of notice of assignment, while in the present case the debt payable by the debtor, and constituting the subject-matter of the assignment, was a debt payable in futuro, for which the assignor was not at the date of notice of the assignment in a position to sue. He suggested that where the subject-matter of the assignment is a future debt, the true rule is that the debtor, after notice of the assignment, remains entitled, as against the assignee, to set off all sums accruing due and payable to the debtor from the assignor at any time before the date at which the debt, the subject-matter of the assignment, becomes due, provided such sums arise out of a liability which existed at or before the date of notice of assignment. He based this proposition upon the decision of Wood V.-C. in *Jeffryes* v. *Agra and Masterman's Bank* (2), and, if the proposition is properly to be deduced from that decision, it would be my duty to follow it. I reserved my judgment in order to consider that case, and I am bound to say that there appear to me to be some obscurities in the case as reported. However, on a careful scrutiny of the report of that case, it does not appear to me to support the suggested proposition. In that case the debt assigned was, it would seem, not debitum

(1) (1840) 1 Man. & G. 753. (2) L. R. 2 Eq. 674.

in praesenti solvendum in futuro, but a debt payable on a contingency, and it was suggested that on that ground alone the decision could be distinguished from the present case. I am not satisfied that a distinction on that ground can be justified. At the date, which was October 12, 1864, of notice of assignment of the debt, the position as between Speltz, the assignor, and the Agra Bank, the debtor, seems to have been as follows: (i.) the assignor was liable to the debtor on general account; (ii.) he was liable to the debtor as acceptor in respect of current bills drawn by or indorsed to the debtor; (iii.) he was liable as indorser to the debtor as indorsee in respect of bills indorsed by him to the debtor on which sums were at the date of notice presently due and payable; (iv.) he was liable as indorser to the debtor as indorsee in respect of bills indorsed by him to the debtor before the date of notice in respect of which nothing was at the date of notice presently due and payable. The Vice-Chancellor's order, as I read it, proceeded on the footing that the debtor was to have the right to set off, as against the Bank of Liverpool, the assignee, so much as, at the date when the debt assigned became due, was still remaining owing from the assignor to the debtor of the following sums: first, the sums due under heads (i.) and (iii.), being existing debts (debita et solvenda in praesenti) at the date of notice; secondly, such of the sums under head (ii.) as became payable before the date when the assigned debt became payable, those sums being sums which at the date of the notice were "liabilities actually accrued," that is, debita in praesenti, though solvenda in futuro: see *Webb* v. *Stenton* (1); but which had, before the assigned debts became payable, become "matured," that is solvenda in praesenti. The debtor was, however, held not to be entitled to set off either (*a*) such of the sums under head (ii.) as had not become payable before the date when the assigned debt became payable or (*b*) any of the sums under head (iv.), the latter sums being at the date of notice what the Vice-Chancellor calls "mere liabilities," that is, not debita at all. It is to be borne in mind that an

(1) (1883) 11 Q. B. D. 518.

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acceptor's liability is normally an absolute liability on acceptance to pay at a future date, and therefore: see *George* v. *Clagett* (1) and *In re Taunton, Delmard, Lane & Co.* (2) available as a set-off at any time after acceptance, while the indorser's liability is normally a conditional liability contingent upon the default of the acceptor, and thus "accruing" only upon such default: see per Bayley J. in *Rowe* v. *Young* (3), and note the language of Phillimore L.J. in *O'Driscoll* v. *Manchester Insurance Committee.* (4) This seems to me to give the key to the distinctions drawn by Wood V.-C. in *Jeffryes* v. *Agra and Masterman's Bank* (5), and embodied in his order. The proposition to be deduced from that case seems accordingly to be that, when the debt assigned is at the date of notice of the assignment payable in futuro, the debtor can set off against the assignee a debt which becomes payable by the assignor to the debtor after notice of assignment, but before the assigned debt becomes payable, if, but only if, the debt so to be set off was debitum in praesenti at the date of notice of assignment.

If my view of the decision in *Jeffryes* v. *Agra and Masterman's Bank* (5) is correct, it is, accordingly, no authority in favour of the proposition which the trustee seeks to establish in order to support his claim to set off the 15,000*l.*, and I am free to act on the view which I have already indicated, that the firm had not, and the trustee has not, any right to set off the 15,000*l.* against the Visconde, that sum not being at the date of the notice debitum in praesenti or "actually accrued though not matured."

In order to prevent any misunderstanding I ought to make it clear that it is not suggested that the debt assigned, and the liabilities sought to be set off against it, are so connected as to bring the case within the authorities of which the case of *Government of Newfoundland* v. *Newfoundland Ry. Co.* (6) is typical.

The result of the whole case is that there will be an order, which—after prefacing that the Court is of opinion that the

(1) (1797) 7 T. R. 359.
(2) [1893] 2 Ch. 175, 184.
(3) (1820) 2 Bli. 391, 467.
(4) [1915] 3 K. B. 499, 515.
(5) L. R. 2 Eq. 674.
(6) (1888) 13 App. Cas. 199.

Visconde was not a partner in the firm and that he is not postponed to other creditors under s. 3 of the Partnership Act, 1890—will declare: First, that the securities retained by the trustee are the property of the Visconde; secondly, that the Visconde is entitled to be admitted to prove for the value as at the date of the bankruptcy of the securities which were pledged by the firm, and were sold by the pledgees, but nothing in this order is to prejudice any claim the Visconde may be advised to make to be treated as a secured creditor against any balance coming to the trustee from securities belonging to the firm pledged to the same pledgees; thirdly, that the Visconde is entitled to be admitted to prove for the amount of the deposit of 100,000*l.*, less the 10,000*l.*, and less the sum (the figure of which is, I understand, agreed) due to the firm from the Visconde on current account at the commencement of the bankruptcy. There does not seem to be any dispute as to figures, and accordingly the order should merely contain declarations to the above effect, with liberty to apply.

As regards costs, the trustee must pay the Visconde's costs of the two motions out of the estate.

Solicitors: *Stoneham & Sons; Kearsey, Hawes & Wilkinson.*

H. C. H.

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In re FRANKLIN AND SWATHLING'S ARBITRATION.

[1927. S. 3053.]

Partnership—Articles—Power for any Partner to nominate Successor—Consent of continuing Partners not to be unreasonably withheld—Application by Nominee to Court to appoint an Arbitrator—Nominee not a Party to the Submission—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 5.

A deed of partnership provided that each original partner could, by will or codicil, nominate a qualified person as a new general partner; that the admission to the partnership was to be subject to the consent, not to be unreasonably withheld, of the general partners; and that a general partner or the qualified nominee, if of opinion that the consent to admission had been unreasonably withheld, could require the matter to be referred to arbitration.

An original partner nominated by will F. S. F., a qualified person, as a new general partner. After the death of the nominator the general partners refused to admit F. S. F. into the partnership. F. S. F. made an application under s. 5 of the Arbitration Act, 1889, asking that some fit and proper person might be appointed to act as arbitrator:—

Held, that only a party to the submission could make an application under s. 5, and that F. S. F. was not such a party.

THIS was an application under s. 5 of the Arbitration Act, 1889, asking that some fit and proper person might be appointed to act as arbitrator under a submission contained in clauses 31 (*b*) (iv.) and 42 of a deed of partnership, dated July 20, 1909, and it raised the point whether such an application could succeed when the person making the application was not a party to the submission.

By clause 36 of the deed of partnership each original partner had a right to introduce a qualified person, nominated by him, as a new general partner for the residue of the partnership for the whole or any part of the nominator's share of profits, and such nomination could be effected by will or codicil, and the nomination was to be irrevocable as from the date of the death of the nominator. Then clause 31 (*b*) (iv.) provided that the admission to the partnership of a qualified nominee was to be subject to the consent, not to be unreasonably withheld, of the general partners voting at a meeting of the partners, and a general partner or the qualified nominee, if of opinion that the consent to admission had been unreasonably withheld, could require the matter to be referred to arbitration. Clause 42 provided that

differences arising either during the continuance of the partnership or afterwards between the partners or their representatives were to be referred to a sole arbitrator pursuant to the Arbitration Act, 1889.

F. S. Franklin, one of the original partners, died in April, 1918, having by his will nominated his son, the present applicant, to become a general partner as from the date of his death. On June 23, 1926, a meeting of the partners was held, and a resolution was passed refusing to admit the applicant as a partner, and stating that the nomination made by the will of his father was void and of no effect. In consequence of that resolution, and the continued refusal of the partners to admit the applicant into the partnership, the present application was made.

Luxmoore K.C. and *G. Whitehead* for the applicant. The applicant was not a partner, but he was nominated a partner. Under clause 31 (*b*) (iv.) of the deed of partnership he has a right to have the question, whether the consent of the partners to his admission to the partnership was unreasonably withheld, referred to arbitration. There is nothing in s. 5 of the Arbitration Act, 1889, to take away his right. The position is very fully dealt with in *Byrne* v. *Reid.* (1) There was also the question of a trust in regard to the nominator's share of profits: see *Page* v. *Cox.* (2)

W. A. Greene K.C. and *Evershed* for respondents. Only a person who has been a party to the submission can apply, under s. 5 of the Arbitration Act, 1889, to the Court for the appointment of an arbitrator. The applicant was not a party to the submission, and the deed of partnership confers no rights on a nominee until certain conditions have been fulfilled. Therefore his rights have not arisen yet. He has no right by contract, and no question of trust applies.

Luxmoore K.C. in reply. The trust is the share of the assets in favour of the nominee. The continuing partners are the trustees, and the nominee is the cestui que trust. Therefore the applicant is a party to an agreement, and he is entitled to his rights.

(1) [1902] 2 Ch. 735. (2) (1851) 10 Hare, 163.

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MAUGHAM J. This is an application by Mr. Alan Philip Franklin asking that some fit and proper person may be appointed to act as arbitrator under a submission contained in clause 31 (*b*) (iv.) of an indenture dated July 20, 1909, being an indenture of partnership. An application under s. 5 of the Arbitration Act, 1889, is one which can only be made by a party to the submission. The general frame of the section is this: "(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator . . . . any party may serve the other parties . . . . with a written notice to appoint an arbitrator," and in default the Court may appoint. The question to be decided now is raised by the respondents by reason of their denial that the applicant is a party to the submission contained in the deed of partnership. A submission is defined by s. 27 of the Act as meaning "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not," and the point taken by the respondents is that although there is in this partnership deed a clause providing that a certain question which has arisen shall be submitted to arbitration, it is nevertheless true that the applicant here is not a party to the deed in any sense whatever.

I do not think I need deal with the facts at any length. I think it is only necessary to say that at a meeting of the "general partners" held on June 23, 1926, they purported to pass a resolution that they did not consent to the admission of the present applicant as a new "general partner." The meeting was held pursuant to clause 31 of the partnership deed, under which any of the original "general partners" might introduce a qualified person upon certain conditions as a new "general partner," and the clause goes on to say, "and so that the introduction of and admission of such new general partner shall be subject to the following conditions and upon the following terms." There are conditions as to what is a qualification. There are conditions also as to age and religion, and as to the experience of the person

named, and the last condition of the clause is to be found in clause 31 (*b*) (iv.), and is in these terms: [His Lordship read clause 31 (*b*) (iv.), and continued:]

Now I am treating this matter on the footing that the applicant was duly nominated and fulfilled all the conditions of nomination, except that under the clause which I have just read the general partners, voting at a meeting of such partners, refused to consent to his admission as a new general partner. Therefore, according to the words of the clause, the applicant had a right to have the question whether the consent was unreasonably withheld submitted to arbitration. But I am not at liberty to enforce it as regards such a clause, unless I come to the conclusion he is a party to the submission. The Arbitration Act, 1889, is, in my view, a technical statute; it is a statute which provides for the ousting of the jurisdiction of the Court; the language of it has to be carefully observed, and it is not open to me to give it any meaning except that which is expressly provided for in the various clauses. In the present case it is apparent that the applicant was not a party to the original deed of partnership, and has not signed it or become liable at present to sign it. His right as a nominee of a partner is that which has been defined in the case of *Page* v. *Cox* (1), by Turner V.-C., and by the Court of Appeal in *Byrne* v. *Reid.* (2) A nominated partner as such has no contractual right whatever; he is within the ordinary doctrine of the common law that only the parties to the contract or their legal personal representatives prima facie have any right to enforce the contract. The doctrine of *Page* v. *Cox* (1) is that if there is a person validly nominated as a partner under a clause contained in the articles of partnership, the result is that a trust is created with reference to the partnership assets for the purpose of enabling a nominated person to take that which he is entitled to under the deed, and I do not doubt that in the present case the applicant upon satisfying the conditions, including the conditions of clause 31 of the partnership deed, would be entitled to enforce the trust which it will then be shown has been created.

(1) 10 Hare, 163. (2) [1902] 2 Ch. 725.

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The present position, however, is that it is impossible to establish that there is a trust for the applicant in respect of the partnership business or assets, because that in effect is the very point which it is desired to submit to arbitration, a difference having arisen owing to the fact that the general partners have decided adversely to the applicant. The applicant admittedly is not at present a partner. The applicant admittedly has no contractual rights. The applicant may be able to establish hereafter that he is a cestui que trust under the doctrine of *Page* v. *Cox* (1), but at the present he cannot do anything of the sort; because, for aught I know, the general partners have properly exercised their rights, and in that case he has no more interest in the partnership assets than a stranger.

Accordingly I have come to the conclusion that it is impossible to say in the circumstances as they now exist that he is a party to the submission, and the application must fail. In saying that he is not a party to the submission I do not want it to be supposed that in such a case as that of *Byrne* v. *Reid* (2), where a valid nomination had been made, and there were no conditions which had to be complied with to enable the nominee to establish the fact of a trust, it would follow that if there was a partnership deed with an arbitration clause in it, that clause might not be enforced by the nominee. I am dealing with a different case—namely, one in which the applicant cannot show at the present time that he is a cestui que trust as regards any of the assets belonging to the partnership. Accordingly, I hold that he is not, within the Arbitration Act, 1889, a party to the submission which is contained in the partnership deed.

The application fails with the usual consequences.

Solicitors for applicant: *Nicholson, Graham & Jones.*
Solicitors for respondents: *Travers-Smith, Braithwaite & Co.*

(1) 10 Hare, 163. (2) [1902] 2 Ch. 725.

P. J. B.

C. A.
1928
Oct. 17, 18.

In re VILLAR.

PUBLIC TRUSTEE *v.* VILLAR.

[1927. V. 858.]

Will—Uncertainty—Perpetuity—Property tied up during numerous Lives and twenty Years after—Queen Victoria's Descendants living on September 6, 1926—Common Form—Future Difficulty and Expense of ascertaining Date of Survivor's Death—Practicability—Validity.

By his will dated June 14, 1921, and confirmed by a codicil of February 2, 1926, a testator who died on September 6, 1926, gave his property to his trustees upon certain trusts as to income and capital for his participating issue as therein defined, using a well known common form so as to tie it up in such a way that the capital was not to vest until the expiration of "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death":—

Held, that though the existing lives selected were very numerous and it might be extremely difficult and expensive in the future to ascertain the date of the survivor's death, the trust did not offend against any rule of law and was therefore valid. It could not be said that it would be beyond the scope of ordinary legal testimony to ascertain the date of the survivor's death so as to avoid the trust, either for uncertainty or as infringing the rule against perpetuities.

Thellusson v. *Woodford* (1805) 11 Ves. 112 applied.

Decision of Astbury J. [1928] Ch. 471 affirmed.

Appeal from a decision of Astbury J. (1)

By his will dated June 14, 1921, a testator appointed the Public Trustee and the testator's adult sons ordinarily resident in England his executors and trustees.

He defined the meaning of certain expressions used in his will as follows:—

"'The period of restriction' shall mean the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death."

(1) [1928] Ch. 471.

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"'Participating issue' shall mean all my issue for the time being living who shall not have any ancestor (being issue of mine) living." A beneficiary forfeited his interest in income on bankruptcy or alienation.

After certain specific gifts he devised and bequeathed all his property to his trustees upon trust out of the income to pay expenses of management and insurance and to pay his wife an annuity of 1000*l.* a year during widowhood and a life annuity of 500*l.* a year on remarriage, each annuity being free of all deductions (including income tax).

Subject thereto and to the provisions thereinafter contained the trustees were during the period of restriction to pay and divide the income equally per stirpes among the testator's participating issue.

The testator then declared: First, that if any person who if living would be one of the participating issue died leaving children they should take their parent's share of income. Secondly, that if a son died he might by will appoint up to one-half of his income to his wife for her life or widowhood. Thirdly, he created a discretionary trust giving a protected life interest to any beneficiary who forfeited his original interest in income by bankruptcy or alienation.

The testator then declared that from and after the expiration of the period of restriction his trustees should hold his residuary trust estate on the trusts following—namely, if any share of income was then subject to the discretionary trust the trustees were to hold a proportionate share of corpus upon trust for such one or more of the participating issue then living (including the forfeiting beneficiary) and the children of the forfeiting beneficiary as the trustees should within six calendar months after the testator's death (1) nominate and in such shares as they should in like manner specify. And the trustees should hold the rest of the corpus upon trust for the participating issue living at the expiration of the period of restriction (other than and except any forfeiting beneficiary) in proportion to their previous shares of income.

(1) Sic.

By a codicil dated February 2, 1926, the testator gave his wife an additional annuity of 200*l.* during widowhood and a 10*l.* life annuity to Louisa Jane Langdon and confirmed his will.

The testator died on September 6, 1926, and his will was proved by the Public Trustee and a son Arthur, who was qualified to be an executor. He left a widow, three sons, a spinster daughter, and a married daughter with two infant children.

There was great difficulty in ascertaining the descendants of Queen Victoria living on September 6, 1926. It appeared, however, from an affidavit of A. T. Butler, Portcullis Pursuivant of Arms, that in 1922 there were about 120 descendants who had then to be sought in England, Germany, Russia, Sweden, Denmark, Norway, Spain, Greece, Jugo-Slavia and Rumania, and many of whom had probably become scattered over the entire continent of Europe, and might even have gone much further afield. It was not certain whether any of the late Tsaritsa's children were living, and owing to the war many of the continental descendants might fall into penury and obscurity, rendering any future tracing extremely difficult, if not impossible. The expense of a strictly proved pedigree of the descendants living at the testator's death would be very heavy.

In these circumstances the Public Trustee issued this summons on October 10, 1927, to determine (inter alia) whether the trusts of the income during the period of restriction and the trusts of the corpus at the expiration of that period were void for uncertainty or on any other ground. The summons also asked that if the trusts were valid an inquiry might be directed to ascertain who were Queen Victoria's lineal descendants living at the testator's death and whether any and which of them had since died.

Astbury J. said that although it would be extremely difficult and expensive to ascertain the period when the capital became distributable twenty years after the death of the survivor of the lineal descendants of Queen Victoria living on September 6, 1926, he could not say that it would be

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impracticable or beyond the scope of legal testimony. He must hold, therefore, that the trust was valid.

The testator's three sons and spinster daughter appealed.

Sir Thomas Hughes K.C. and *Edward Beaumont* (for *J. W. F. Beaumont*) for the appellants. The uncertainty of the testator's residuary gift is so great that it tends towards a perpetuity. It will be quite impracticable to tell when the period of restriction ends. First, it is almost impracticable to ascertain Queen Victoria's lineal descendants living on September 6, 1926. Since the war the position of many of these persons has greatly altered. Many of the descendants are living the lives of private persons, and in some cases in considerable obscurity. Many difficult questions arise. Are any of the late Tsaritsa's children living ? Are the children of morganatic marriages legitimate by English or foreign law ? But, secondly, assuming that the class of lineal descendants can be ascertained at enormous expense, it will be quite impracticable to keep in touch with all of them and ascertain when the survivor dies, probably some eighty years hence.

There is a degree of inconvenience which will lead the Court to hold that the residuary gift is void for uncertainty. If the death of the last survivor of the lineal descendants could not be proved, the result would practically be to cause a perpetuity. It was pointed out by Lord Nottingham in *Howard* v. *Duke of Norfolk* (1) that when a matter of this kind becomes too inconvenient the Court will know how to stop it, and he adds : " Whenever the bounds of reason or convenience are exceeded, the law will quickly be known." Property must not be made inalienable during a number of lives exceeding that to which testimony can be applied to determine when the survivor dies : see per Lord Eldon in *Thellusson* v. *Woodford*. (2) That was the principle applied by Joyce J. in *In re Moore*. (3) Since 1914 the conveyancers have been of opinion that the use of a limit of time fixed by reference to the lineal descendants of Queen Victoria should

(1) (1681) 2 Freem. Ch. 72, 81. (2) 11 Ves. 112, 146.
(3) [1901] 1 Ch. 936.

be abandoned, even as regards powers of re-entry: see Jarman on Wills, 6th ed., vol. i., p. 297; Gray on Perpetuities, 2nd ed., paras. 169, 216, 219*a*; and Key & Elphinstone's Precedents of Conveyancing, 10th ed., vol. i., p. 547. In the ninth edition of the latter work the form now in question was still used: see p. 498.

The difficulty of ascertaining a class may be so great that it amounts to uncertainty. Here income may well be unable to prove that the class is still in existence or capital to prove when the survivor died.

[They also referred to *In re Lanyon.* (1)]

Baden Fuller for the widow.

Topham K.C. and *Bischoff* were not called upon.

J. H. Stamp for the Public Trustee.

LORD HANWORTH M.R. This is an appeal from Astbury J., who had to determine whether or not in the main the will of the testator ought to be declared ineffective and that the proposed trust disposition of his residuary estate failed on the ground that it was void for uncertainty, or, in other words, that it was impracticable. [His Lordship then stated the facts and continued:] It is said that the terms of the residuary gift which are easy to carry out as regards the payment of income at the present time are to be treated as invalid, because of the period of restriction to the end of which distribution of the capital was postponed. The argument is that as the ascertainment of the end of this period will create serious difficulty in time to come, the residuary gift ought to be set aside as invalid. The period of restriction is defined as "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death." We have the evidence of a member of the College of Arms, who says the descendants of Queen Victoria numbered not less than 120 in 1922, and that they might have increased in number by 1926. On the other hand I suppose they might have decreased in number,

(1) [1927] 2 Ch. 264.

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for I do not know whether the births of new descendants between 1922 and 1926 were sufficient to fill the vacancies among the descendants caused by death. However it is quite clear that there were a large number of the descendants of Queen Victoria in being on September 6, 1926, and obviously there may be great difficulty in ascertaining whether and when the last of these lineal descendants had passed away. That is what has to be ascertained, and it depends on the existence of one single life out of many others. I recognize that serious difficulty might well arise in the future in ascertaining the date when that life ceased.

It is plain from the judgment of Astbury J. that it was with reluctance that he decided that the provisions of the will were valid. He said if he could have seen his way to say that this tying up of the capital was invalid he would gladly have done so. For myself, I hold the same view. Indeed, I think I may use the words of Lord Eldon in *Thellusson* v. *Woodford* (1), when he says : " If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret, that such a will should be maintained. But that goes no farther than as a motive to see whether it contains any thing, resting upon which we may as judges say it is an attempt to make an illegal disposition." I join with Lord Eldon and Astbury J. in regretting that a will may be validly made in terms which give rise to great difficulty at present or in the future without any corresponding advantage to any one, except to give latitude to the vanity of the testator.

But while I hold these views, it is plain that I have to set them aside when acting judicially, and consider what is the law applicable to the case. In this respect much assistance can be obtained from *Thellusson's* case (2), where Sir A. Macdonald C.B. says, in reference to an observation of Lord Nottingham in *Howard* v. *Duke of Norfolk* (3) : " When he declares, that he will stop, where he finds an inconvenience, he cannot, consistently with sound construction

(1) 11 Ves. 112, 145. (2) 11 Ves. 135.
(3) 2 Freem. Ch. 72.

of the context, be understood to mean, where judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, when inconvenience begins; namely, by an attempt to suspend the vesting longer than can be done by legal limitations." And Lord Eldon says (1) that the decision to be reached cannot depend on the number of lives, "but the question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops." Applying these passages and the rules adhered to in *Thellusson* v. *Woodford* (2), we have to ask ourselves whether the testator has by his will offended against any rule of law. He has defined the period of restriction as a period lasting during the lifetimes of a number of ascertainable persons or the survivors or survivor of them. It is true that the number is considerable, amounting to 120 or 130, but they can be ascertained at the present time. It follows that the testator has selected a period of restriction during which division of the capital is postponed, which, inconvenient though it may be, offends against no canon of law at the present time.

But it is said that the Courts ought to take into consideration the difficulty that will arise in the future when, it may be 100 years hence, their successors will be faced with the problem of finding out who is the last survivor of this body of 120 or 130 persons and when he died. That is a difficulty which may arise by reason of the vicissitudes of life, but it may not. It is possible that 120 years hence the Court may find a number of problems relating to the births, marriages and deaths of various persons; but they appear to me to be matters which we ought not to take into account. The difficulties are not insurmountable, and they may in fact never arise. Therefore I return to the view that the only matter I have to consider is whether the residuary gift of the testator can be declared invalid on the ground that it has

(1) 11 Ves. 146. (2) 11 Ves. 112.

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transgressed some rule of law at the present time. The answer must be that it has not so transgressed, and, if so, we cannot by reference to difficulties that may arise hereafter make a new will for the testator.

I regret the decision, as there is no reason for such a fanciful disposition; but testing it by the rules which have to be applied, I can find no breach of the existing law, and the will must therefore stand. The appellant has suggested that the whole residuary gift should be set aside, but at the present time there is no difficulty in dealing with the estate as directed by the testator. It seems impossible to set aside a gift which works well in the present but which may in the future cause difficulty. I think that the decision of Astbury J. was right, and that the appeal must be dismissed.

LAWRENCE L.J. I agree. In my judgment the decision in *Thellusson* v. *Woodford* (1), which is binding on this Court, affords a complete answer to the contention of the appellants that the testator's residuary gift is void, as infringing the rule against perpetuities. In that case Lord Eldon (2), after approving of the opinion expressed by Lord Thurlow in *Robinson* v. *Hardcastle* (3), that it is competent to a testator to give a life estate, to be appointed by the survivor of 1000 persons, states that (4) "the language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops."

Much stress has been rightly laid by the appellants in the present case on the words "not exceeding that to which testimony can be applied," but in my opinion these words were intended to apply to cases such as in *In re Moore* (5), where it is obviously impossible to ascertain the lives specified.

Moreover I think that in cases of that kind the question is not whether the rule against perpetuities has or has not been infringed, but whether the gift is void for uncertainty.

(1) 11 Ves. 112.
(2) Ibid. 145.
(3) (1786) 2 Bro. C. C. 22, 344.
(4) 11 Ves. 146.
(5) [1901] 1 Ch. 936.

If it be impossible to ascertain the lives upon the death of the survivor of which the vesting of the capital is to take effect, such vesting is not in fact postponed beyond the permitted limit, but the gift is void for uncertainty. That this was the opinion of Joyce J. is shown by his judgment in *In re Moore* (1), with which I agree.

In the present case there is in my opinion no infringement of the rule against perpetuities. All that is said is that there will or may be great difficulty in ascertaining the lives upon the death of the survivor of which the ultimate vesting depends. If it could now be established definitely that it is impossible to ascertain who were the descendants of Queen Victoria living at the death of the testator, and that any inquiry for the ascertainment of such descendants which might be directed by the Court would necessarily prove abortive, there would be solid ground for holding that the gift was void for uncertainty. That however cannot be said in this case. The evidence shows at most that it is difficult at the present time to ascertain who are the lineal descendants in question, and that it may probably be more difficult in the future to ascertain who is the survivor of such descendants. But it cannot properly be said now that it is impossible to ascertain which of the lives mentioned by the testator were in existence at his death, and it is mere speculation whether it would be difficult or easy to ascertain the date of the death of the survivor of such lives. In my judgment the evidence falls far short of proving that the number of lives exceeds that to which testimony can be applied to determine when the survivor of them drops. The mere fact that difficulties may hereafter arise in ascertaining which is the survivor of the lives mentioned by the testator is not in my judgment a ground for holding that the gift in question is void for uncertainty.

For these reasons, although I share the regret expressed by the Master of the Rolls and by the learned judge at the result of our decision, I have come to the conclusion that the order appealed against was right and that the appeal must be dismissed.

(1) [1901] 1 Ch. 936.

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RUSSELL L.J. I am of the same opinion. The property here is made to vest within legal limits; therefore, it is impossible to say that it creates or tends towards a perpetuity. Then it is said that the residuary gift is void for uncertainty. In my opinion we are unable to say that. The persons to take under the gift are clearly defined, and the event on which they are to take is equally clearly defined. All that can be said is that it may be and probably will be expensive and difficult to prove that the specified event has occurred, and for that the only authority is the affidavit of Mr. Butler, who says: "In my opinion it is possible that as a consequence of the events which have happened since 1914 some of the continental descendants of Her Late Majesty Queen Victoria who were living at the death of the testator and are still alive may fall into penury and obscurity, a state of things which may and probably will make it extremely difficult, if not impossible, to trace them and ascertain strictly the date of their deaths." The case cannot therefore be put higher than that it may be difficult and expensive hereafter to prove who is the last survivor of the lineal descendants of Queen Victoria specified and when he or she died. In my opinion this falls short of a ground for saying that the residuary gift is void for uncertainty. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Church, Rendell, Bird & Co., for Bird & Lovibond, Uxbridge; Gregory, Rowcliffe & Co., for Thomas Broomhead, Taunton.*

H. C. G.

CURTIS *v.* FRENCH.

EVE J.
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Oct. 30, 31.

[1928. C. 660.]

Vendor and Purchaser—Sale by Auction of House—Misleading Particulars—Premises sold with "vacant possession on completion"—Continued Occupation by statutory Tenant—Action for Damages by Purchaser—Condition excluding Compensation for Misstatements a Defence to Action.

At a sale by auction of property belonging to the defendant the plaintiff became the purchaser of a freehold cottage, subject to the National Conditions of Sale, clause 10 of which provided that no error, misstatement or omission in the particulars should annul the sale, nor should any compensation be allowed by either party in respect thereof.

The particulars stated that the cottage was let to a tenant whose notice to quit had determined but who had been allowed to remain in occupation on sufferance, and that the premises would be sold with vacant possession on completion.

The statement was misleading, as the premises were in fact in the occupation of a sub-tenant who claimed to be entitled to remain on as a statutory tenant under the Increase of Rent and Mortgage Interest (Restrictions) Acts, and refused to vacate them.

The purchaser refused to complete without vacant possession, with which he could have resold the property at a profit, and sued the vendor for damages for breach of contract:—

Held, that the action failed. There was no breach of contract, the statement in the particulars being an error or misstatement within clause 10 of the Conditions in respect of which the purchaser could claim no compensation.

Observations on the duty of a vendor at a sale by auction to annex a copy of general printed conditions, subject to which the sale is to be made, to the particulars.

WITNESS ACTION.

At a sale by auction held on June 22, 1926, of property belonging to the defendant, the plaintiff was the highest bidder for and became the purchaser of Lot 5, described as a freehold cottage at Farley Green, near Albury, Surrey, let to one Tickner, a farmer, and in the occupation of one of his employees, at the price of 400*l*. The particulars of the lot concluded with the following statement: "The cottage was let to Mr. A. Tickner, a local farmer, for one of his employees. The tenant formally and legally terminated the tenancy, but has not yet handed over vacant possession, the vendor has not pressed for possession, allowing

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the occupier to remain on sufferance, but the premises will be sold with vacant possession on completion."

The property was sold subject to the National Conditions of Sale, 1925, and to certain special conditions. Condition 10 of the National Conditions provided as follows: "The property is sold subject to land tax, tithe rentcharge, rights of way and water, and other rights, easements, quasi-easements, liabilities and public rights affecting the same." Then followed certain words as to tenancies, which Eve J. held were superseded by condition 8 of the special conditions. Condition 10 proceeded: "No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor shall any compensation be allowed either by the vendor or the purchaser in respect thereof."

Condition 8 of the special conditions was as follows: "Each lot is sold subject to all tenancies, outgoings and rights, easements and exceptions and any other matters referred to in the particulars, and the conveyance to the purchaser of each lot shall contain reservations in respect of these matters."

The cottage was in fact let to Tickner not for the purpose of its occupation by one of his employees, but to be sub-let by him, and it was so sub-let to a workman in his employment. Tickner had given to the vendor one year's notice to determine his tenancy expiring in 1924, but the occupant still remained in possession as a statutory tenant under the Rent (Restrictions) Acts, and refused to vacate the cottage on the ground that he could not find anywhere else to live equally convenient to him.

Eve J. found that the statement in the particulars that the vendor had not pressed for possession was quite untrue. On the contrary, he had been pressing for possession since January, 1925, and had refused to accept any rent for the cottage. On the other hand, he had taken no proceedings to eject the occupant. The purchaser insisted on vacant possession being given on completion, and on February 22, 1928, commenced this action for specific performance of the contract of sale and damages in addition to or lieu thereof

and further or other relief. The claim to specific performance was abandoned at the trial. The defence was that there was no breach of the contract as properly construed, the statement that vacant possession would be given on completion being a misstatement within General Condition 10. The defendant was unable, through no default of his own, to give vacant possession. The purchaser gave evidence that he had received an offer of over 500*l.* for the property, if sold with vacant possession.

Ronald F. Roxburgh for the plaintiff. The plaintiff claims damages not limited by the rule in *Bain* v. *Fothergill* (1), because the vendor has not taken the proceedings to eject the sub-tenant which he should have taken: *Lord Hylton* v. *Heal* (2), and therefore the vendor has made default: *Braybrooks* v. *Whaley*. (3) Clause 10 of the National Conditions is no defence to the action (*a*) because the misstatements were not made in good faith; (*b*) because clause 10 relates only to errors or misstatements of fact and cannot relieve the vendor from an express term of his contract that the premises would be sold with vacant possession on completion.

Henry Johnston for the defendant. The plaintiff cannot recover damages in respect of a statement in the particulars which by the conditions is not guaranteed to be accurate. It is a misstatement, therefore it is not a breach of contract, and no compensation is payable for it. The plaintiff's only remedy was to refuse to complete and ask for the return of his deposit money: *In re Terry and White's Contract* (4); *Nicoll* v. *Chambers*. (5)

The statement in the particulars that the tenant had given notice to quit was quite true, and tenant does not include sub-tenant for the purpose of s. 5, sub-s. 1 (*c*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, where one of the conditions for obtaining an order for possession is that the "tenant" has given notice to quit and the

(1) (1874) L. R. 7 H. L. 158.
(2) [1921] 2 K. B. 438.
(3) [1919] 1 K. B. 435.
(4) (1886) 32 Ch. D. 14.
(5) (1852) 11 C. B. 996.

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landlord has agreed to sell the premises: *Lord Hylton* v *Heal.* (1)

The vendor's mistake is one due to the complexities of real property law, including the Rent (Restrictions) Acts.

The question is whether the case falls within s. 5, sub-s. 1 (*c*), of the Act of 1920. The notice given by Tickner was not valid, as he had delegated his rights to his sub-tenant Tourte. He could not in the circumstances give a valid notice, even if he had wished to do so. Even if *Lord Hylton* v. *Heal* (1) does apply to the present case, it is one where the Court in the exercise of its discretion would refuse to turn out the occupier.

Roxburgh in reply. Admittedly a purchaser can only obtain rescission, and not damages, in respect of an innocent misdescription "in a material and substantial point" where a vendor is protected by clause 10: *Jacobs* v. *Revell.* (2) But this is not, in the plaintiff's submission, a case of misdescription. Apart from express stipulation, vacant possession on completion is an implied term of a contract for sale of an unincumbered fee simple interest in land: *Hughes* v. *Jones.* (3) The vendor cannot use clause 10 for the purpose of converting the express promise that the premises will be sold with vacant possession on completion into the exact opposite in order to exclude an implied term of his contract. Moreover the words complained of are not innocent, as they were in the case of *In re Terry and White's Contract.* (4) The vendor is in default: *Day* v. *Singleton* (5); and the purchaser claims substantial damages for the loss of his bargain: *Engel* v. *Fitch.* (6)

EVE J. At a sale by auction held on June 22, 1926, the plaintiff was declared the purchaser of Lot 5 for the sum of 400*l.*, and thereupon paid the usual deposit of 10 per cent., namely, 40*l.*, and signed the memorandum attached to the particulars whereby he agreed to pay the balance of

(1) [1921] 2 K. B. 438.
(2) [1900] 2 Ch. 858.
(3) (1861) 3 D. F. & J. 307, 313.
(4) 32 Ch. D. 14.
(5) [1899] 2 Ch. 320.
(6) (1868) L. R. 3 Q. B. 314; (1869) L. R. 4 Q. B. 659.

the purchase money "and in all other respects to complete the purchase according to the within written conditions of sale and the conditions of sale incorporated therein," and the auctioneers as agents for the vendor, the defendant in this action, thereby confirmed the sale and as stakeholders acknowledged the receipt of the deposit.

Lot 5 in the particulars is described as a "freehold old-fashioned cottage situate at the north corner of Farley Green, Albury" in the county of Surrey, and at the foot of the particulars is contained a statement to the effect that this lot "was let to a Mr. A. Tickner, a local farmer, for one of his employees. The tenant formally and legally terminated the tenancy, but has not yet handed over vacant possession, the vendor has not pressed for possession, allowing the occupier to remain on sufferance, but the premises will be sold with vacant possession on completion." Completion was fixed for July 22, one month after the auction sale, and neither at that date nor, as far as I am informed, at any time since has the vendor been in a position to deliver to the purchaser the premises with vacant possession, nor, as far as I can see, did he after the execution of the contract take any steps in order to qualify himself when the day of completion arrived to fulfil his contract.

After the lapse of a very considerable period the plaintiff issued his writ on February 22 in the present year, claiming specific performance of the agreement constituted by the memorandum to which I have referred, damages in addition to or in lieu of specific performance, and further or other relief. By way of defence to the action the defendant relies on the terms of the contract. He asserts and pleads that there has been no breach on his part of the contract as properly construed, and that in these circumstances he is not liable in damages for breach.

The question turns primarily on the construction of this contract, and in order to construe it one must first of all appreciate the various documents which are incorporated in and form part of it. They are, first of all, page 5 of the particulars, then there are the special conditions primarily,

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and in a secondary sense the general conditions which are to be treated as incorporated with the special conditions, except so far as the special ones contradict or are at variance or are inconsistent with the general ones. In those cases, if any there be, the special conditions are to prevail.

The plaintiff is not now claiming specific performance, but is seeking to treat the contract as broken by the defendant and is asking for damages. He complains of the inability of the defendant to do that which he contracted to do, to put him in possession of these premises on the day fixed for completion, and he says, and in my opinion he says with considerable force, that there is contained on the face of the particulars a series of statements which, although they may be to some extent capable of being reconciled with actual facts, are in the main contrary to or inconsistent with the actual facts, and could only have been framed in order to create in the minds of bidders at this sale an opinion which certainly would not have been entertained by any such bidder had he known the true facts.

I have read the paragraph at the foot of the particulars with regard to Lot 5. It begins with the statement that the cottage "was let to a Mr. A. Tickner, a local farmer, for one of his employees." No evidence has been produced in support of that statement, and indeed according to a letter written by the solicitors acting for the farmer in question, and neither answered nor dealt with by the vendor's agents, it is inconsistent with what took place. According to the statement made by those solicitors, it was let to Mr. Tickner with the intention that it should be sub-let to other persons, and if that be so the suggestion underlying this statement that any persons in physical occupation of the cottage could be regarded as holding the cottage as part of the remuneration for their services had no foundation in fact.

The next statement is accurate so far as it goes: "The tenant formally and legally terminated the tenancy," but it fails to convey to the would-be purchaser that the notice to determine had been given three years and had expired nearly two years before the auction, a material matter, as

will be seen from the rest of the paragraph, which goes on "but has not yet handed over vacant possession." That is true. Mr. Tickner, who had given the notice expiring in September, 1924, had not handed over vacant possession of the premises, but he had never been in actual occupation during any part of the period. He had sub-let the cottage, and he was not therefore in a position to hand over vacant possession unless and until he had got rid of the persons in occupation. Then comes a statement which to my mind is absolutely untrue: "the vendor has not pressed for possession, allowing the occupier to remain on sufferance." On the contrary, the vendor or his agents had been pressing for possession. They had as early as the end of 1924, or in January, 1925, refused to accept the rent; they had refused to recognize the title of the parties tendering the rent, and according to the evidence of the agent he had by correspondence and frequent interviews been urging these people to quit and deliver up possession. Moreover he had lost the benefit of a contract or contracts of sale—I think there were two, but at any rate of a contract or an offer which could have been turned into a contract of sale with vacant possession, by reason of the obstinate refusal of these persons to vacate the cottage. It is a statement which is untrue in fact and calculated to create, and intended in my opinion to create, in the minds of intending bidders the impression that the tenant was willing to go out but that there had been no pressure put upon him, and he had been allowed to remain on sufferance until it would become necessary to turn him out in order to complete this contract. It goes on "but the premises will be sold with vacant possession on completion," which means, I think, that you must introduce into this contract a term which, having fixed the date of completion as July 22, would run somewhat as follows: "On which day possession shall be given to the purchaser."

I have already stated sufficient to show that in my opinion there was here not only one but more than one misstatement affecting the subject-matter of the contract. If the contract were silent as to what the effect of such a misstatement

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would be, I feel very little doubt that in this case the purchaser would be entitled to damages on the footing that this was not an innocent mistake but was an over-colouring of the position not merely by way of extravagant adulation but involving misstatements of fact the inaccuracy of which must have been known to the vendor's agent. But the particulars only constitute one element of the contract, and in this contract is incorporated a condition from the general conditions which has a very material bearing on the result of the conclusions at which I have arrived. Condition 10 of the general conditions—and if I may be permitted at this stage to make an observation, it is this : that I cannot help thinking it would be prudent, especially in the case of sales held in the country, where the sale is made subject to general conditions, that a copy of these conditions should be circulated with the particulars—reads : " The property is sold subject to land tax, tithe rentcharge, rights of way and water, and other rights, easements, quasi-easements, liabilities and public rights affecting the same." So far that seems to me to apply. Then there come a few words with regard to tenancies which in favour of the purchaser I will assume are superseded by condition 8 of the special conditions. That means to say one would then read into condition 10 of the general conditions condition 8 of the special conditions, which provides that : " Each lot is sold subject to all tenancies, outgoings and rights, easements and exceptions and any other matters referred to in the particulars, and the conveyance to the purchaser of each lot shall contain reservations in respect of these matters." That comes to this, that so far as Lot 5 is concerned, Tickner, the tenant, has not in fact given vacant possession, but the vendor apprehends there will be no difficulty in getting him so to do—that the tenant has been allowed to remain there and has not left simply because the vendor has not pressed him, and that in due course he will be got out before completion. Condition 10 goes on : " No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor shall any compensation be allowed either by the

vendor or purchaser in respect thereof." Now, what is this paragraph at the foot of Lot 5 but a series of misstatements affecting the premises and contained in the particulars? But here is a term of the contract which says, notwithstanding that it is a misstatement, the purchaser is not to be entitled to recover any damages or compensation in respect of it. In the position which has arisen he would be entitled to rescind the contract, to recover his deposit with interest, and the costs of investigating the title, but nothing more. He has bargained for vacant possession of that which he has purchased. He cannot have vacant possession, the vendor cannot give him what he contracted to give him, but the contract itself precludes him from recovering anything for the loss sustained by reason of the misstatements. The action is brought for specific performance, but at the time the plaintiff does not ask for this relief; he is content with damages if he can obtain them. In my opinion he cannot, the terms of the contract are too strong, and the action, so far as it is an action for damages, fails. The defendant does not seek to retain the deposit. This must be repaid with such interest as it has earned in the hands of the stakeholders, and having regard to the fact that if rescission had been claimed the plaintiff would have been entitled to recover his costs of investigating the title, I think it is a case in which I am justified in saying there should be no costs on either side.

Solicitors: *W. W. Box & Co.; Cooper, Bake, Fettes, Roche & Wade.*

H. L. L.

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In re PROFITS AND INCOME INSURANCE COMPANY, LIMITED.

[00262 of 1925.]

Insurance company—Annuity granted to retired employee—Winding-up order—Proof—Death after winding-up order—Contingent liabilities—Valuation of annuity—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 206—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 3, 17, 29, 30, *Sch. VI.*

On the resignation of the actuary and secretary of an insurance company which, in addition to other branches of insurance business, carried on the business of ordinary life assurance, both by the issue of policies upon human life and by the granting of annuities upon human life, the directors passed a resolution granting him a pension. The company was subsequently ordered to be wound up compulsorily and the late actuary, having lodged a proof in respect of his pension, died before the proof was dealt with :—

Held, that the annuity was an annuity within the meaning of the Assurance Companies Act, 1909, and must be valued, as at the date of the winding-up order, in the manner indicated in that statute.

In re British Union and National Insurance Co. [1914] 2 Ch. 77 considered.

SUMMONS.

The facts, which are fully stated in the judgment, were briefly as follows :—

In May, 1924, Charles Windett, who had for some years been employed by the Profits and Income Insurance Company, Ld., as its actuary and secretary, resigned and the directors granted him a pension. On June 9, 1925, a compulsory order was made for the winding up of the company. On July 4, 1925, Mr. Windett lodged a proof for (inter alia) the arrears of the annuity down to the date of the winding up and also for the capital value of the annuity. Nothing happened for a period of eighteen months with regard to this proof. Meanwhile, on November 15, 1926, Mr. Windett died. In April, 1927, the liquidator, having heard of the death of Mr. Windett, took the view that there was no claim on the footing of the value of the annuity, but only for the amount of the instalments down to the date of the death. He therefore rejected the claim in its existing form and limited it so as to conform to his view.

The widow and legal personal representative of Mr. Windett took out a summons that the decision of the liquidator be reversed.

The question (arising out of the summons) which is material for the purposes of this report was whether the amount of the claim was to be ascertained in accordance with the provisions of the Companies (Consolidation) Act, 1908, or with the provisions of the Assurance Companies Act, 1909.

Upjohn K.C. and *Beebee* for the applicant. The time for estimating the value of the annuity is the date of the winding-up order. The principle of *Macfarlane's Claim* (1) does not apply to insurance companies since the Assurance Companies Act, 1909. That Act provides a complete code of rules for valuing policies in the winding up of each class of insurance companies to which it applies. It is admitted, on behalf of the respondent, that this company comes within the class referred to in s. 1 (*a*) of the Act of 1909. The other material sections of the statute are ss. 3, 17, 29 and 30; and Sch. VI. (A): see *In re Law Car and General Insurance Corporation.* (2) The annuitant was a policy holder: see *In re British Union and National Insurance Co.* (3) On that authority the instrument in the present case, which provides evidence of a contract to pay the annuity, is a policy within the meaning of the Act. The applicant's claim must prevail, as at the date of the winding-up order, in accordance with the first rule laid down in cl. A of Sch. VI.

[They also referred to *In re United London and Scottish Insurance Co.* (4)]

Preston K.C. and *J. M. H. Wilson* for the liquidator. The rejection of the proof by the liquidator is perfectly proper. The real point is whether the claim is ascertainable under the Act of 1908 or under that of 1909. The Official Receiver's view is correct. Two questions arise—namely, (1.) whether the annuity is an annuity under the Act of 1909; and (2.) whether the Court is compelled to hold that the applicant

(1) (1880) 17 Ch. D. 337.
(2) [1913] 2 Ch. 103, 107, 116, 118, 135.
(3) [1914] 2 Ch. 77, 84.
(4) [1915] 2 Ch. 12.

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is entitled to prove for a sum considerably in excess of the amount which he could possibly have received if he had lived and the company had not gone into liquidation. The resolution authorizing the payment of the premium and granting an annuity is not within the scope of the Act of 1909. Sect. 30 contemplated some formal instrument, such as a deed in writing containing the terms of the bargain. There is no instrument of that kind in the present case, but merely a resolution of the board contained in the minute book of the company. The Act of 1909 never contemplated any such bargain as this. It is a pension granted to a retired official and not an annuity of the kind to which the Act of 1909 applies. In the present case the salary was not paid solely out of the life assurance funds. *In re British Union and National Insurance Co.* (1) is distinguishable, as the annuity in that case was within the Act, because it was granted in respect of damages arising out of a breach of contract relating solely to the life involved. This pension is not a policy within the meaning of s. 30 (*b*), nor is it in any sense an annuity for the purposes of the Act of 1909. If, as the result of a bankruptcy, a larger sum is obtained than that which would have been obtained if there had been no bankruptcy, there may be a resulting trust. It could not be the intention of the Legislature that a creditor, by virtue of a rule under a statute, should receive 5000*l.*, when he would in the ordinary course of justice receive 1000*l.* There would be a resulting trust for the other creditors.

[They referred to *In re Miller* (2) and *Ex parte Bates.* (3)]

Upjohn K.C. in reply. In *In re British Union and National Insurance Co.* (4) all the judges in the Court of Appeal agreed that consideration was immaterial, unless there was some transaction infringing the provisions of s. 3, sub-s. 2, of the Act of 1909. The decision in that case was clear, and the observations as to the character of the annuitant's claim were not necessary to the decision.

(1) [1914] 1 Ch. 724; [1914] 2 Ch. 77, 88.
(2) (1877) 6 Ch. D. 790.
(3) (1879) 11 Ch. D. 914.
(4) [1914] 2 Ch. 77.

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Nov. 26. ROMER J. This is an appeal by the legal personal representative of one Charles Windett from the rejection by the liquidator of the Profits and Income Insurance Company, Ld., of a substantial portion of Charles Windett's claim to prove in the liquidation of the company.

The facts giving rise to the claim and rejection are as follows. Charles Windett had for some years prior to May 26, 1924, been employed by the company as its actuary and secretary. On that day his resignation was accepted by the board of directors, who thereupon passed a resolution to grant him a pension of 666*l.* 13*s.* 4*d.* payable quarterly free of income tax, such pension to date from July 1, 1924. It was at the same time resolved to invite him to take a seat on the board, his fee as director to be considered as part of his pension. His salary at the date of his retirement was 2000*l.* a year. The company was at this time carrying on the business of ordinary life assurance both by the issue of policies upon human life and the granting of annuities upon human life. In addition it carried on the business of insuring against loss of income through sickness or accident, and certain reinsurance business. Mr. Windett's services were not, therefore, connected solely with the life department and his salary was not in practice paid exclusively out of the life fund. On June 9, 1925, the company was ordered to be wound up compulsorily and in due course the Official Receiver was appointed liquidator. On July 24, 1925, Mr. Windett lodged his proof for 430*l.* arrears of his pension due on April 1, 1925, for 7000*l.* for damages for loss of his pension after that date, and for 146*l.* 6*s.* 8*d.* in respect of the costs of certain proceedings taken by him against the company in the King's Bench Division. On November 15, 1926, Mr. Windett died, his proof not having at that time been dealt with by the liquidator. On January 21, 1927, the liquidator, in ignorance of Mr. Windett's death, addressed a letter to him asking for the date of his birth in order that the actuary might make the necessary calculation of the valuation of the pension at the date of liquidation. Thereupon the applicant, being the widow and legal personal

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representative of Mr. Windett, wrote to the liquidator furnishing him with the dates of her husband's birth and death respectively. On April 20, 1927, the liquidator replied to the applicant as follows: "I have now had an opportunity of considering the proof of debt lodged by your late husband in respect of his claim in the liquidation of this company. The claim has now been calculated as follows: Taxed costs in judgment of King's Bench Division and under order of Court of Appeal, 146*l.* 6*s.* 8*d.*; arrears of pension from September 30, 1924, to November 15, 1926 (date of claimant's decease), at 666*l.* 13*s.* 4*d.* per annum, free of tax, equivalent to a gross pension of 833*l.* 6*s.* 8*d.* per annum (assuming income tax at 4*s.* in the pound)—pension for two years and forty-seven days, 1773*l.* 19*s.* 5*d.* Total claim 1920*l.* 6*s.* 1*d.* The amount originally included in the proof of debt was based on the purchase price of an annuity for the normal expectation of life of a person of the same age as the claimant. As, however, the actual period of survival is now known this will require to be substituted for the period of expectation of life that was originally estimated, the result being that the claim will require to be altered from the original amount of the proof of 7576*l.* 6*s.* 8*d.* to the amount as calculated above of 1920*l.* 6*s.* 1*d.* I shall be glad accordingly if you will sign and return the enclosed form of withdrawal." It will be observed that in this letter the liquidator treated Mr. Windett as having had a gross pension of 833*l.* 6*s.* 8*d.* per annum. In this of course he was wrong. But if this was the amount of the pension and if the amount of the claim had to be ascertained in accordance with the provisions of the Companies Act of 1908, the liquidator's reduction of the proof was justified: see *Macfarlane's Claim.* (1) If, however, the pension fell to be valued in accordance with the provisions of the Assurance Companies Act, 1909, as to the valuation of an annuity, the liquidator's rejection was wrong, the provisions of that Act excluding any other method of valuation and negativing the principle applied in *Macfarlane's Claim* (1): see *In re Law Car and General*

(1) 17 Ch. D. 337.

Insurance Corporation (1); and *In re City Life Assurance Co.* (2) The applicant through her solicitors then stated her contention to be that the proper basis of computation was to value the pension as at the date of liquidation and not as at the date of Mr. Windett's death, but without making any express reference to the Assurance Companies Act of 1909, and on July 14, 1927, the liquidator served upon her a formal rejection of her claim to the extent of 6010*l.* 16*s.* 5*d.* He stated his grounds to be that the claim must be limited to the unpaid arrears of pension which accrued during the life-time of Mr. Windett, and he now treated the pension as being, what it in fact was, one of 666*l.* 13*s.* 4*d.* Those arrears amounted to 1419*l.* 3*s.* 7*d.* The liquidator then added that income tax at the current rate would have to be deducted from any dividend paid on this sum, the agreement to pay an annual sum free of income tax being void.

On August 2, 1927, the applicant issued her summons asking to have the Official Receiver's decision reversed, supporting it by an affidavit which submitted that the proper basis for ascertaining her claim was the value of a pension of 666*l.* 13*s.* 4*d.* free of tax calculated according to insurance companies' actuarial tables as at the date of the liquidation, and further submitting that no tax should be deducted from any dividend paid to her. The affidavit made no reference to the Act of 1909 or any other Act. In reply to this affidavit the Senior Official Receiver made an affidavit in which he submitted amongst other things that the amount of the claim should be ascertained under s. 206 of the Companies (Consolidation) Act, 1908. In this state of things the matter came before me in Court on November 15, 1927. The learned counsel who then represented the applicant presented the case to me on the footing that the claim had to be ascertained under s. 206 of the Companies Act, 1908, and that *Macfarlane's Claim* (3) applied, and that therefore the only question which I had to deal with was the question of the deduction of income tax. This point I decided against her, with the result that

(1) [1913] 2 Ch. 103, 119. (2) [1926] Ch. 191, 201.
(3) 17 Ch. D. 337.

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her summons was dismissed with costs. On December 29, 1927, the applicant, having changed her legal advisers, gave notice of appeal from my order and the appeal came on for hearing on March 2, 1928. It then appeared that the appeal was based upon the ground that the pension ought to be valued in accordance with the provisions of the 1909 Act and not under the Act of 1908. Objection was at once taken on behalf of the liquidator that this point had been abandoned before me. In these circumstances the Court of Appeal came to the conclusion that the question whether the applicant ought to be bound by the admission could best be determined by me. They accordingly discharged my order and referred back to me the whole matter, including the question how the costs in the Court of Appeal and the costs of the original hearing before me should be dealt with. The summons was accordingly restored to my list and came on for hearing with further evidence. I gather that it was the intention of the Court of Appeal that I should hold the applicant bound by the admission of her counsel, if I so thought fit. Seeing that my order has been discharged I should have felt some difficulty in holding the applicant precluded from raising any contention she thought fit, whether abandoned previously or not. But however that may be, I am satisfied that the admission made before me was made under a misapprehension, and that the applicant's counsel had not present to his mind the provisions of the Act of 1909, but that thinking that the Act of 1908 was applicable he merely intended to abandon the task, which in that case was hopeless, of distinguishing *Macfarlane's Claim* (1) from the one before me. In these circumstances it appeared to me only right that the applicant should not be held precluded from rearguing her case on the proper grounds, seeing that it is open to me to make such an order as to costs as will prevent the liquidator from being in any way prejudiced. I, therefore, allowed the question whether the 1909 Act applied to be argued, and that question I must now decide.

That the Act of 1909 applies to the company is quite clear. The company carried on within the United Kingdom life

(1) 17 Ch. D. 337.

assurance business, as defined by s. 1 of the Act. The provisions contained in s. 17 of the Act with reference to the valuation of policies are, therefore, applicable in the winding up. Sub-s. 1 of that section provides as follows: "Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act." This must be read in connection with s. 30 (*b*), which enacts that: "Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant." Assuming, therefore, for the moment that the pension of Mr. Windett is an annuity within the meaning of the Act the liability of the company to him must be ascertained in the manner stated in sub-s. (A) of the Sixth Schedule. For I cannot doubt that the minute recording the resolution of the board of May 26, 1924, signed by the chairman of the next meeting, is an instrument evidencing the contract to pay that annuity and is, therefore, a policy within the meaning of s. 17, sub-s. 1. That being so, and still making the assumption above mentioned, the claim of the applicant would appear to be well founded. For it is not disputed that the value of the annuity as at the date of the winding-up order has been ascertained according to a proper rate of interest and table of mortality, and though neither s. 17 nor the Sixth Schedule expressly mention the date at which the valuation of a policy or liability is to be made, it seems quite clear that the date must be that of the winding-up order. The word "unexpired" in sub-ss. (B), (C), and (D) of the Sixth Schedule must, for example, mean unexpired at the time of the winding-up order. It was, in fact, so decided by Kennedy L.J. in the *Law Car and General Insurance Corporation* case (1) (see too *In re United London and Scottish Insurance Co.* (2)).

(1) [1913] 2 Ch. 103, 135. (2) [1915] 2 Ch. 12.

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It is, however, submitted by the liquidator that Mr. Windett's pension is not an annuity on human life within the meaning of the Act at all. Now the expression "annuities on human life" is one of those dealt with in the Interpretation section—s. 29. It is there provided that the expression does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependants of such persons. Now the pension of Mr. Windett was not payable out of any such fund, so that the section has no direct application to him. It does, however, show by implication that such a pension as his may be an annuity within the meaning of the Act. Why, then, is it not one? The answer to this question is to be found, so the liquidator says, in s. 3 of the Act. That section is as follows: "(1.) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund," and sub-s. 2 says this: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

It is not at first sight easy to see what bearing this section has upon the matter. It was, however, contended on the part

of the liquidator, as I understood his argument, that, as Mr. Windett was not engaged exclusively in the life department of the company, his pension could not be paid out of the life fund and that therefore it is not an annuity within the meaning of the Act. But sub-s. 2 provides in effect that the life fund shall be held as security for amongst others the holders of annuities. If then the pension cannot be paid out of the life fund it must be because it is not an annuity. For if it be an annuity Mr. Windett was a policy holder of the life assurance class, his pension formed part of that class of business for which the life fund was applicable, and the concluding words of sub-s. 2 would not exclude him from sharing in the fund. The liquidator's argument would, therefore, seem to be reduced to the simpler proposition that the pension is not an annuity within the meaning of the Act, because, seeing that Mr. Windett was not engaged exclusively in the life department, the life fund did not receive the consideration or did not receive the whole of the consideration for the granting of the pension. Now this was the ground upon which Astbury J. held that an annuity was not an annuity within the meaning of the Act in *In re British Union and National Insurance Co.* (1) In that case one Urch was employed as manager of the life department of an insurance company to which the Act of 1909 applied. Disputes having arisen between him and the company, an agreement of compromise was entered into under which in consideration of Urch releasing the company from all liability under his service agreement the company covenanted to pay an annuity during Urch's lifetime. The company was subsequently ordered to be wound up and, thereupon, Urch claimed to have his annuity valued according to Rule A of Sch. VI. of the Act and to be paid out of the life fund. It was held by Astbury J. that the annuity was not an annuity within s. 30, sub-s. (*b*), of the Act. He said this : " Sect. 30 provides that ' where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications,' and sub-s. (*b*), which is an

(1) [1914] 1 Ch. 724, 739 ; [1914] 2 Ch. 77, 85, 87, 89.

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ordinary definition clause, provides that 'where the company grant annuities upon human life, "policy" shall include the instrument evidencing the contract to pay such an annuity, and "policy holder" includes annuitant.' The section does not, however, say that every instrument creating an annuity granted by an insurance company is a policy nor that every annuitant is a policy holder. What I think it means is this, that where the company in the ordinary course of its business does in fact grant annuities upon human life as part of its life assurance business, then the instrument used by it in granting such an annuity shall be a policy within the meaning of the Act, and the person entitled to such an annuity shall also be a policy holder. But it is to be observed that in those cases the consideration for the grant of the annuity would form part of the life annuity fund, and the persons entitled to be so regarded as policy holders would be confined, and I think ought to be confined, to those who have made the appropriate subscriptions to the life annuity fund of the company. If this were not so, an insurance company could, I think, largely evade its obligations under the Act by granting annuities to creditors whether they were creditors under fire or accident policies or otherwise, in which case the distribution of their assets in due course would be prevented in the liquidation. In my judgment, although the point is not free from difficulty, I do not think that the deed creating this annuity in Urch's favour comes within the language, meaning, or intent of s. 30."

His view, therefore, was that only those annuities which are granted in the ordinary course of business for a cash consideration are annuities within the meaning of the Act. The Court of Appeal, however, took a different view of the meaning of the Act. Lord Cozens-Hardy, after pointing out that there was abundant consideration for the grant of the annuity and that it was not ultra vires, said this: "Astbury J. considered that the annuity was not granted in the ordinary course of business, i.e., in consideration of a payment to the life assurance fund, and therefore was not within the Act, but with great respect I am unable to agree with this view.

It is not consistent with the decision in *In re Nelson & Co.* (1), and it involves the insertion in s. 30 (*b*) of the words 'for a cash consideration only.' For this I think there is no justification. This annuity was granted for valuable consideration, and the nature of that consideration is not important."

Pausing there, it should be stated that the annuity was granted to Mr. Windett for valuable consideration, as was held by Fraser J. and the Court of Appeal in the proceedings taken by him against the company in the King's Bench Division already referred to. Now it would seem from the judgment of Lord Cozens-Hardy that the nature of the consideration need not be inquired into. In the present case, therefore, the fact that the consideration flowing to the company was not one that exclusively benefited the life fund would not seem to affect the matter. Swinfen Eady L.J. said this: "The learned judge below decided that this annuity is not an annuity within the meaning of the Act, and has not the security of the life assurance fund, as it was not granted for a consideration which could be carried to the credit of and form part of the life annuity fund; he held that the persons entitled to be regarded as policy holders within the meaning of the Act ought to be confined to those who have made the appropriate subscriptions to the life annuity fund of the company. I am unable to adopt this view, as there is not any provision in the statute which justifies restricting in this manner the class of persons entitled to be regarded as policy holders."

So far the Lord Justice agrees with the Master of the Rolls that the consideration for an annuity under the Act need not be cash or its equivalent. But he then proceeded as follows: "Under these circumstances I am of opinion that an annuity granted in good faith and for value is entitled to the security of the life assurance fund so long as the transaction does not infringe the provisions of s. 3, sub-s. 2. The learned judge below stated that, unless annuities were confined to those who made the appropriate subscriptions

(1) (1906) 22 Times L. R. 406.

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to the life assurance fund, an insurance company could largely evade its obligations under the Act by granting annuities to creditors under fire or accident policies. But this objection is not well founded. Sect. 3, sub-s. 2, provides that a fund of any particular class shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable; and therefore no annuity granted in respect of any fire or accident loss could become a valid claim against the life assurance fund. But the annuity granted to Urch was in respect of his claim to damages for breach of a contract relating solely to the life department, and providing for such a claim is not within the mischief which it is the object of s. 3, sub-s. 2, to prevent."

It will be observed that in this passage the Lord Justice is no longer dealing, in terms at any rate, with the question of whether the annuity was an annuity within the meaning of the Act. He would seem to have disposed of that question in the earlier passage that I read. If that be so he would appear to be now considering the question of whether every annuity under the Act is entitled to the security of the life assurance fund and to hold that it is, but only so long as the granting of the annuity does not infringe the provisions of s. 3, sub-s. 2. But this would appear to treat the concluding words of s. 3, sub-s. 2, as a qualification of the first part of the sub-section, which constitutes the fund the security of the policy holders of the life assurance class. They are not, however, expressed to be a qualification and can hardly be so treated seeing that the granting of the policies entitled to the charge is the very class of business referred to in the words in question.

One alternative would be to treat the Lord Justice as still considering the question of whether the annuity was an annuity within the Act, that is to say whether the holder was a policy holder of the class to whom the charge was given. But it is impossible to suppose that the Lord Justice intended to indicate that any light was thrown on that question by a provision that the fund was not to be applied directly or

indirectly for any purposes other than those of the class in question. I cannot help thinking that the Lord Justice was merely pointing out that a life annuity must be granted bona fide in exercise of the powers of granting such annuities and not with the motive of making the life fund liable for a debt that ought to be discharged out of some other fund. His reference to the granting of an annuity in respect of a fire or accident loss points in this direction. So too does his statement that the annuity granted to Urch was in respect of his claim to damages for breach of a contract relating solely to the life department. Those damages would not have been payable out of the life fund, as had been in effect pointed out by Astbury J. They would have been payable out of the company's general assets, and the reference by the Lord Justice to the fact that the contract related to the life department was, I think, merely for the purpose of negativing the possibility of there having been any want of bona fides or improper motive on the company's part.

The same observation applies to the judgment of Pickford L.J. He emphasized the fact that the annuity had been granted bona fide and for good consideration, the consideration being the settlement of a claim for damages which the Lord Justice recognized would only have been recoverable out of the general assets of the company. He did indeed add this : " Whether an annuity given in settlement of a debt arising out of the general business of the company would be contrary to s. 3 it is not necessary to consider, as in this case the claim in respect of which it was given arose entirely out of the business of the life department." But when once it is conceded that the consideration coming to the company need not be one that benefits the life fund, it is difficult to see how the question of whether the annuity is an annuity within the meaning of the Act, assuming it to have been given bona fide, can depend upon whether it was or was not given for a reason that can be connected with the life department. The fact that the claim in respect of which the annuity was given in that case arose entirely out of the business of the life department was, I think, treated by the

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Lord Justice as having ruled out the possibility of its having been given for an improper purpose, a possibility that would not necessarily have been ruled out had the annuity been given in settlement of a debt arising out of the general business of the company. In the present case Mr. Windett as secretary and actuary was necessarily connected very closely with the work of the life department. It seems to me impossible to come to the conclusion that, in granting him an annuity in consideration of his resigning his position, the company was actuated by the improper motive of throwing upon the life fund a liability that ought to have been borne by some other portion of the company's assets merely because Mr. Windett's activities were not confined to the life department. In my opinion his annuity was an annuity within the meaning of the Act of 1909 and falls to be valued in the manner there indicated. It is obvious that no income tax can be deducted by the liquidator from any dividends payable in respect of the value so ascertained.

There is one other matter that I ought to mention. It was contended by the liquidator that the result of allowing the claim may be that the applicant will receive a larger sum by way of dividend than would have come to Mr. Windett had the company never gone into liquidation, and that this would be grossly unfair to the other creditors. But this is not a matter with which the Court is concerned. The legislature has thought fit to enact that an annuitant under the Act is to prove for the value of his annuity as at the date of the winding-up order. That value will be ascertained by reference to his expectation of life, as fixed by the table of mortality taken for the purpose. Should his life be in fact prolonged beyond the normal expectation it is an irrelevant consideration that he will receive less than he would have done had the company continued to carry on its business. The fact that in the result he gets more by reason of his life falling short of the normal expectation is equally irrelevant.

In my judgment the claim must be allowed with costs. The applicant must, however, pay to the liquidator the costs

of the day in respect of the earlier hearing before me and the costs of her appeal to the Court of Appeal.

Solicitors: *H. F. K. Ireland; William Charles Crocker.*

J. L. D.

In re SANDWELL PARK COLLIERY COMPANY. FIELD *v.* THE COMPANY.

[1927. S. 3053.]

Vendor and Purchaser—Debenture Holders' Action—Sanction of Court to be obtained—No Date fixed—Date fixed for Completion—Deposit Money paid—Sanction of Court not obtained before Date fixed for Completion—Repudiation of Contract by Purchasers—Return of Deposit Money—Interest on Deposit Money.

Where, in a debenture holders' action, the receiver contracts to sell property included in the debentures, subject to the contract being approved and sanctioned by the Court, and no date is fixed for obtaining such approval, it must be obtained before the date fixed for completion of the contract

On October 31, 1927, the receiver in a debenture holders' action entered into a conditional contract to sell land and cottages included in the debentures. The contract provided that the purchase should be completed on or before December 31, 1927. By clause 14 it was provided that the contract was subject to its being approved and sanctioned by the Court, and in the event of its not being so approved, it was to become void, and the purchasers were to be entitled to be repaid their deposit. The receiver took no effective steps to obtain the sanction of the Court, and on January 10, 1928, the purchasers' solicitors wrote to the debenture holders' solicitors repudiating the contract and demanding the return of the deposit money under clause 14. On an application for an order that the conditional contract should be confirmed:—

Held, that the purchasers were entitled to repudiate the contract and to be repaid their deposit money, together with all interest earned by such deposit from the date of its payment to the vendor.

THIS was an application by summons in a debenture holders' action for an order that a conditional contract, dated October 31, 1927, made between the receiver and manager of the one part, and certain purchasers of the other part, for the sale at the price of 23,075*l.* of land and cottages

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included in the debentures should be confirmed, and for consequential relief. The purchasers under the contract were made respondents to the summons. The action, which was a debenture holders' action in the usual form, was commenced on August 24, 1927. On August 31 an order was made appointing the receiver and manager on behalf of the plaintiffs and other debenture holders of the defendant company, and by consent the motion was treated as a motion for judgment, and the usual accounts and inquiries were directed. On October 31, 1927, the receiver entered into the conditional contract above mentioned, and a deposit of 2307*l.* 10*s.* was paid. Clause 6 of the contract provided that the purchase should be completed on or before December 31, 1927. Clause 8 stated that the vendor was selling as receiver for debenture holders, and that objections and requisitions on title should be sent within seven days from the delivery of the abstract, and should be replied to within three days after the delivery thereof. Clause 14 provided that "This contract and the sale hereby agreed to be made is subject to the same being approved and sanctioned by the Court. In the event of the same not being so approved and sanctioned, this contract shall become void without any liability to either party, in which event the purchasers shall be entitled to be repaid their deposit, but without any interest thereon." Application for confirmation of the contract (as also of another contract for sale) was made by summons dated November 21, 1927. This summons was adjourned to the judge. The second contract was confirmed, but the rest of the summons was ordered to stand over. The attention of the judge was not called to the fact that the date fixed for completion would expire on December 31, 1927. On December 20 the purchasers' solicitors wrote accepting the title and enclosed the abstract with the expression of a hope that the obtaining of the sanction of the Court to the contract would be expedited. On December 23 they wrote to the vendor's solicitors enclosing draft conveyance, and on December 24 the vendor's solicitors acknowledged the receipt of the draft conveyance, but

stated that they could not approve the draft until the order of the Court sanctioning the contract had been obtained. On January 10, 1928, the purchasers' solicitors wrote a letter to the plaintiffs' solicitors, in which they explained that the deposit was found and provided, not by the purchasers, but by one J. P. Alderson; that the purchasers had given Alderson an agreement which definitely earmarked the deposit as his money, and which specifically provided that in the event of the deposit being refunded it was Alderson's property. The letter then continued: "The contract provides that the purchase should be completed on or before the 31st December last, and also that the contract is subject to the same being approved by the Court, and that in the event of the same not being so approved the deposit should be repaid. Now the necessary consent was not in fact obtained by the date specified. In fact, it has not even yet been obtained. We therefore formally require the repayment of the deposit under special condition 14." The letter further stated that the absence of the necessary consent had rendered it quite impossible for Alderson to proceed with the scheme which he had in mind for the promotion of a company to acquire the land for a greyhound racing track, and that the delay had killed the project. As a matter of fact the purchasers themselves were not in a position to complete the contract. The letter of January 10 was followed on January 17 by another formal demand for the repayment of the deposit. The certificate, however, was not obtained until April 23, 1928, and it was filed on May 4. The present summons was taken out on June 11, and it was not till it was now brought forward that the Court was asked to make the order confirming the contract.

Gover K.C. and *Errington* for the purchasers. Where there is a condition attached to a contract for sale, and no time is fixed for its performance, it must be performed before the date fixed for the completion of the contract: *Smith* v. *Butler*. (1) Here the sale was subject to the condition that the sanction of the Court should be obtained, and no date

(1) [1900] 1 Q. B. 694.

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was fixed for obtaining such sanction. No attempt was made to obtain the sanction of the Court before the date fixed for completion; in fact, such sanction has not yet been obtained. Even if there had been no condition, the abstract of title showed that the vendor was a receiver in a debenture holders' action, and as such he could not convey without the sanction of the Court, and the purchaser could have repudiated the contract: *Forrer* v. *Nash* (1); *In re Head's Trustees and Macdonald* (2); *Bellamy* v. *Debenham* (3); and *Halkett* v. *Earl of Dudley.* (4) *Stickney* v. *Keeble* (5) deals with the position where the purchaser is not responsible for the delay in the completion of a contract.

The delay here has been caused by the negligence of the receiver, who is an officer of the Court, and the Court will not, in such a case, enforce the contract. The purchasers can repudiate the contract, and require that the deposit money be repaid.

Spens K.C. and *Evershed* for the vendor. The suggestion that it was essential that the sanction of the Court should have been obtained before the date fixed for the completion of the contract is not supported by the cases. All the cases that have been cited are cases where the vendor could not show title. This is essentially a different case to one where the vendor is owner. Lord Parker in *Stickney* v. *Keeble* (6) shows that in equity the time fixed for completion is not always essential. He also deals with the conduct of the vendor and purchaser. (7) Here, as from January 10, the purchasers in effect said that no matter when the sanction of the Court was obtained they would not complete. Therefore, as from that date, time ceased to be essential. *Smith* v. *Butler* (8) is the only case that in any way supports the purchasers' contention, and it is really quite different to one where the contract is with a receiver.

The vendor is entitled to have the contract confirmed.

Cur. adv. vult.

(1) (1865) 35 Beav. 167.
(2) (1890) 45 Ch. D. 310.
(3) [1891] 1 Ch. 412.
(4) [1907] 1 Ch. 590.
(5) [1915] A. C. 386.
(6) [1915] A. C. 415.
(7) [1915] A. C. 418.
(8) [1900] 1 Q. B. 694.

Nov. 14. MAUGHAM J. [after stating the facts, proceeded:] The questions which arise upon the present application are questions of considerable importance in relation to sales with the approbation of the judge in debenture holders' actions, and as such sales are now very common it may be useful to consider the position in regard to them.

A contract for sale of property in a debenture holders' action entered into by a receiver should, I think, generally contain a clause stating the date by which the approval of the Court must be obtained, and in my experience that is the usual practice. In such a case time will be of the essence of the condition, and there will in general be no difficulty in obtaining the approval of the judge to a sale before the fixed date. Sometimes in such a case the receiver takes steps to obtain from the purchasers an extension of the time for obtaining the approval of the Court; but if such extension of time is refused there is no difficulty in dealing with the matter under Order LI., r. 1 (*b*), before the certificate has been obtained, and, therefore, before all the persons interested are ascertained.

In the present case the contract provides for the sale being subject to the approval of the Court, but states no time within which such approval is to be obtained. Clearly, therefore, the approval must be obtained within a reasonable time; and, for reasons which will appear, I have come to the conclusion that in the circumstances of such a case as the present a reasonable time cannot be later than the date fixed for completion—namely, in this case December 31, 1927. This is not based upon the view that the date for completion was in equity of the essence of the contract, a matter with regard to which I do not think it necessary to express an opinion, although it seems to be clear that the intention of the purchasers was to acquire the property for purposes which might be thought to involve expedition. The contract, however, was entered into by the receiver, not as agent for the owners, but as an officer of the Court, and therefore by a person who had himself no title to the property whatever. Clause 14 of the contract

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must be regarded as a condition precedent which had to be satisfied before the contract would be binding as a contract for sale.

Courts of equity, in dealing with actions for specific performance relating to land, have been accustomed to give effect to the real intention rather than to the precise words fixing the date for completion. The effect is that a clause fixing the date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one sale depends. The distinction is obvious. In the first case both parties are bound, and a moderate delay in completion is thought not to injure either. In the latter, the very existence of the mutual obligations is dependent on the performance of the condition. The purchasers do not know in the first instance if their purchase money will ever be required. In general, and in the present case, there is no promise or undertaking by the vendor that the condition will be fulfilled. Equity has, I think, never applied its liberal views as to time to such a condition. If a date is mentioned, the condition must be exactly complied with. If a date is not mentioned, the condition must be fulfilled within a reasonable time; there is no difference between the views of law and equity in considering what is a reasonable time, and the uncertain position of the purchasers must be borne in mind.

The situation in the present case is not very unlike that which was considered by the Court of Appeal in *Smith* v. *Butler*. (1) There was an agreement in that case to purchase from the defendant the lease of a public house on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount of money remaining due on mortgage as was then due. There was no express statement as to the date by which such consent of the mortgagee must be obtained; but there was a difficulty in obtaining it;

(1) [1900] 1 Q. B. 694.

and the plaintiff unwisely treated the contract as at an end, and repudiated it before the date fixed for completion. The Court of Appeal held that the defendant had until the date fixed for completion in which to perform the condition of obtaining the consent of the mortgagee. Romer L.J. says this (1): "To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor." I think, taking the judgments as a whole, it is reasonably apparent that the Court took the view that the date fixed for completion was the time by which the condition had to be performed, and considered that if that time had passed the purchaser might have recovered the deposit. The cases of *In re Head's Trustees and Macdonald* (2) and *Bellamy* v. *Debenham* (3), though not so closely in point, seem to me to support the view that a condition precedent to the validity of a contract for sale of land must prima facie, in the absence of express provision, be fulfilled before the date fixed for completion.

I should add that I do not think the purchasers in such a case as the present are in any way directly affected by what takes place in Chambers in the debenture holders' action, or that any such proceedings can throw light upon the question what is a reasonable time within which a receiver for debenture holders must obtain the sanction of the Court to a contract for sale. It is, of course, true that the purchasers enter into the contract upon the express stipulation that the sanction of the Court will have to be obtained; but it does not follow that they must be taken to know that this circumstance is likely to occasion any considerable delay. Since the year 1893 there has been a rule (Order LI., r. 1 (*b*)) under which the judge in person may direct a sale before judgment and also after judgment before all the persons interested are ascertained, and accordingly before the certificate of the master is made. In these days there is no need for

(1) [1900] 1 Q. B. 699. (2) 45 Ch. D. 310.
(3) [1891] 1 Ch. 412.

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delay, if the parties concerned are expeditious, and bring satisfactory evidence before the Court. In an urgent case counsel can apply for an early hearing of the matter, and I have known more than one case in which the sanction of the Court to a sale in a debenture holders' action has been obtained within a very few days after the issue of the writ. There is therefore no ground in the present case for drawing the conclusion that the parties to the contract must have anticipated any difficulty in obtaining the approval of the Court before the date fixed for completion. It is, I think, of great importance that purchasers negotiating with receivers should be able to negotiate on the terms that they will know at an early date whether or not their contracts are binding.

There is, however, another point which is I think decisive on the question whether the applicant is entitled to recover the deposit of 2307*l.* 10*s.* The position of a purchaser in regard to a deposit in a case where there has been delay in completion for which the purchaser has not been responsible has been clearly explained in the case of *Stickney* v. *Keeble.* (1) From Lord Parker's opinion in that case (2) it is apparent that in a contract for the sale and purchase of real estate the time fixed for completion has at law always been regarded as essential, and with the result that after the day fixed for completion is past the purchaser can treat the contract as at an end, and recover his deposit. He points out, however, that equity did not look upon the stipulation as to time in the same light, and constantly decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and restrained proceedings at law based on such failure. He deals with the effect of s. 25, sub-s. 7, of the Judicature Act, 1873, as follows (3): "My Lords, I cannot give to the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained

(1) [1915] A. C. 386. (2) [1915] A. C. 415.
(3) [1915] A. C. 417.

an action at law based on the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law the Court of Chancery took cognizance of everything which had happened up to the date of the decree, and in applying s. 25, sub-s. 7, of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The section cannot in my opinion mean that the rules as to time laid down by Courts of Equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Judicature Acts the Court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity."

I have, therefore, to consider here the question whether the applicant is entitled to the equitable relief of specific performance at the present date, and whether the Court ought to approve the contract with that end in view, and would before the Judicature Act have restrained an action at common law by the purchasers. In considering these questions, I have to consider the facts as they exist at the present time; for, as Lord Parker points out (1), the vendor's conduct, even in cases when the time fixed for completion is not in equity of the essence of the contract, may disentitle him to equitable relief, and in order to ascertain whether he is so disentitled, his conduct both before and after the date fixed for completion must be considered. In the present case I think it is quite impossible to hold that the purchasers who entered into the conditional

(1) [1915] A. C. 415.

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contract in question on October 31, 1927, ought to be told to-day, after more than a year has elapsed, that the Court approves and sanctions the contract notwithstanding the facts to which I have above referred. The delay in obtaining the approval of the Court, apart from the definite repudiation of the purchasers in January last, has, I think, entitled the purchasers to object to specific performance of such a contract as is here in question. The consequence is that the purchasers have their legal rights as regards the deposit, and these are, to treat the contract as at an end, and to recover the deposit paid, together with all interest earned by such deposit since it was paid to the vendor.

Solicitors for the purchasers: *Collyer-Bristow & Co., for Forsyth, Bettinson & Co., Birmingham.*

Solicitors for the vendor: *Peacock & Goddard, for Shakespeare & Vernon, Birmingham.*

P. J. B.

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Nov. 28, 29.

[1928. C. 1951.]

Public Health—Sewer or Drain—Building Estate—Line of Pipes communicating with disposal Works which had when made an effective Outfall, but owing to the filter Bed ceasing to function now passed the Sewage over the Land—Vesting in local Authority—Motion with Witnesses—Declaratory Order—Appeal to Ministry of Health—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 15, 17, 299—*R. S. C., Order* XXV., *r.* 5.

The plaintiff was the owner of a house and grounds on the X estate, a leaseholder in 1900 and freeholder since 1920. Down to 1912 there was no drainage system for the estate, but in that year a system was established (which so far as affected this property was called "the northern system") by the then owners of the estate with an effective outfall, but without any reference to the local authority, which was maintained since 1920 by means of contributions from property owners to the owner of the part where the disposal works were situated. From these works the effluent passed into the river Mole, but owing to the filter-bed ceasing to function, pollution of the river occurred, and this outfall being stopped by the action of the Thames Conservancy, the effluent was now carried over the adjoining land. In an action by the plaintiff for a declaration that the system vested in the defendants and that they were liable to maintain it:—

Held, that the line of pipes which communicated with the disposal works was not a sewer which vested in the local authority, but that the remedy of the plaintiff was to appeal on behalf of the whole of the persons in the district to the Ministry of Health under s. 299 of the Public Health Act, 1875.

The action being heard by agreement as a motion with witnesses no declaratory judgment ought to be made thereon.

Meader v. *West Cowes Local Board* [1892] 3 Ch. 18 distinguished.

MOTION WITH WITNESSES.

The plaintiff was the owner of a house and grounds on the Fetcham Estate, Epsom. He was a leaseholder in 1900, and in 1920 bought the freehold of the property. Down to 1912 there was no drainage system for this estate, but in that year such a system was established (which so far as affected this property was called the "northern system") by the then owners of the estate, but without any reference to the defendants as local authority, and had an effective outfall, and was maintained by them since 1920 by means of contributions from property owners to the owner of the part where the

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disposal works were situated. From these works the effluent passed through a ditch into the river Mole, but the filter bed having ceased to function it was carried over the adjoining land. The plaintiff now alleged that the whole of this system vested in the defendants, and that they were liable to maintain it. The facts are fully stated in his Lordship's judgment.

Gavin Simonds K.C. and *S. G. Turner* for the plaintiff. We are asking a declaration that the lines of pipes forming the northern system of drainage of the Fetcham estate are sewers vested in the defendant council. They come within the definition given by s. 4 of the Public Health Act, 1875.

Scholefield K.C. and *Erskine Simes* for the defendants. It is not a sewer unless it has an effective and lawful outfall: *Meader* v. *West Cowes Local Board* (1); *Pakenham* v. *Ticehurst Rural Council.* (2)

[*Simonds.* The sewer vested in the council in 1912, when there was an outfall. The cause of the alteration in that was the pollution of the River Mole.]

Scholefield. The defendants have adopted a new system of sewage for the whole district.

[*Simonds* referred to *Attorney-General* v. *Peacock.* (3) The outfall was lawful when made, the bed of the river ad medium filum being in the then owners of the system. The plaintiff had applied to the Ministry of Health under s. 299, but they would not determine the question.]

Scholefield referred to s. 15 as to the liability to repair. This action was incompetent: *King's College, Cambridge* v. *Uxbridge Rural Council.* (4) 14 & 15 Geo. 5, c. lxiv., replacing 57 & 58 Vict. c. clxxxvii., made the outfall unlawful when it passed into the River Thames or a tributary, which the Mole was.

[MAUGHAM J. referred to *Kershaw* v. *Taylor.* (5)]

By s. 17 sewage had to be purified before being discharged into streams. Repair did not involve reconstruction: *Reg.* v. *Epsom Union.* (6) The Court cannot make a declaratory

(1) [1892] 3 Ch. 18.
(2) (1903) 67 J. P. 448.
(3) [1926] Ch. 241.
(4) [1901] 2 Ch. 768.
(5) [1895] 2 Q. B. 471.
(6) 8 L. T. 383.

judgment in this case. The remedy is under s. 299 : *Robinson* v. *Workington Corporation* (1) ; *Pasmore* v. *Oswaldtwistle Urban Council* (2) ; *Earl Harrington* v. *Derby Corporation*. (3)

Simonds replied, and referred to the case of *Barraclough* v. *Brown*. (4)

Clement Edwards held a watching brief for the Great Bookham Parish Council.

MAUGHAM J. This is an action by Mr. Charles Stanley Gordon Clark against the Epsom Rural District Council, which comes on on motion with witnesses. The plaintiff claims by his writ a declaration that certain lines of pipe forming the northern system of drainage of the Fetcham Estate in the parish of Fetcham and Rural District of Epsom are sewers vested in the Epsom Rural District Council ; a declaration that the District Council are liable to keep the said sewers in repair ; a mandatory injunction ordering the District Council well and sufficiently to repair the said sewers ; and certain other declarations which I need not read. The motion was originally moved before me on October 23 last, and asked for an order that the defendants do forthwith well and sufficiently repair the lines of pipes in question and the septic tank into which they discharged, and for a further order that the defendants do forthwith take all necessary steps so to dispose of the sewage flowing into and through the said sewers that no nuisance shall be caused thereby. I think it is unfortunate that the matter comes on on a motion with witnesses, none of whom have been called, and without any pleadings, because I have been up to the last in some doubt what the true issues are between the parties. Substantially, the motion has somewhat curiously resolved itself into a claim for a declaratory order and for no other relief.

The facts are in effect not in dispute. The plaintiff resides at a house and grounds called "Fetcham Lodge," part of the area intended to be drained by the pipes in question,

(1) [1897] 1 Q. B. 619.
(2) [1898] A. C. 387.
(3) [1905] 1 Ch. 205.
(4) [1897] A. C. 615.

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first under a lease from the year 1900, and subsequently as freeholder, having bought the freehold in the year 1920. When he came upon the scene in 1900 there was, as I understand it, no proper drainage system at all; but in the year 1912 a drainage system was established which drained his property, and which has been called in various documents relating to the matter the "northern system," because there was a southern system on the Fetcham Park Estate with which I am not concerned. The north system was established in 1912 by the then owners of the estate and without any reference whatever to the defendants as the local authority, and accordingly they neither inspected nor approved the plans. Ever since that time the northern system has been maintained, so far as it has been maintained, by the owners of the Fetcham Estate from time to time. Since 1920 it has been maintained by means of certain contributions which persons owning the property were required to make to the holder of that part of the works in question, which has been described in the case as the "disposal works"; and until quite recently nobody has suggested that the defendants are the owners of the drainage system, or that it had vested in them or that they have been under any liability in connection therewith. The system, as I have said, was laid down in the year 1912. It involved, as a plan exhibited and marked "S. B. 1" shows, some pipes draining a number of houses, running from a certain farm which is to the southward of the premises where the plaintiff lives, passing under a railway by a way-leave or licence from the railway determinable on six months' notice, reaching certain works called the "disposal works," and there being joined by another series of pipes or another pipe draining some houses; and from the "disposal works" there runs a pipe in a northward direction draining into a ditch communicating with the River Mole, and designed, I think, for taking an effluent intended to be purified at the "disposal works" and to carry off the effluent into the river. According to the evidence the "disposal works" consisted of a septic tank syphoned to a filter bed, and from thence ran the

pipe line by which the fluid after filtration was intended to pass to the River Mole. According to the evidence of Mr. Pratley, the surveyor for the western portion of the district under the control of the defendants, the northern system was not laid to a proper level, and in consequence has always been surcharged. As far as I can judge, it was never a satisfactory system, for there is evidence that from the beginning—namely, May 10, 1912—the effluent was unsatisfactory from time to time, and that on a number of days tainted and injurious samples were taken of the effluent discharged into the ditch that I have mentioned communicating with the river. It appears that in the year 1924, when Mr. Sidney Bennett, a chartered surveyor, of the firm of Nightingale, Page & Bennett, was placed in charge of the supervision of the drainage system, he found that the pollution of the River Mole was caused through the filter bed having become impregnated to such an extent that it had ceased to function. He obtained estimates to put it in working order, which ran into hundreds of pounds. To save this expense, and, he says, in the belief that the defendants intended shortly bringing their main drainage to the village, he gave instructions to disconnect the filter and arrange for a temporary means of carrying off the fluid over adjoining land. So that since the year 1924 (the system of filtration having ceased to function for an unknown period), the connection at the "disposal works" of the system with the filter was completely stopped, and the sewage was allowed to escape over the adjoining land. I have already stated that the system has hitherto been maintained by the various owners of property in the neighbourhood. After Mr. Charles Stanley Gordon Clark had purchased Fetcham Lodge and 40 acres of land namely, in the year 1924 the whole estate remaining unsold at that date, being some 500 acres, including the "disposal works," were sold by the then owner to Sir Edward Mountain, and he almost immediately resold the property to various purchasers, retaining, I think, in his hands only the "disposal works." The system by which persons having the use of the system contributed a portion

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of the expense has continued, so far as I know, up to the present time, Quite recently the plaintiff, concerned no doubt at the inefficient way in which the drainage was being conducted, took steps in the matter, and was advised by counsel, and a claim was made based on the contention that the whole of the system had vested in the defendants under s. 13 of the Public Health Act, and accordingly it was alleged that there was a statutory duty imposed upon the defendants to maintain the system: and on this being refused the action was brought.

A number of questions are raised in the matter, some of them of very considerable importance, and, inasmuch as the case may go further, I think it right to express my opinion on each of the points that have been raised. The first one is this. Mr. Scholefield for the defendants says that upon the evidence I must come to the conclusion that the system in question is not a sewer within the meaning of s. 13 of the Public Health Act, 1875, because when it was first started in 1912 there was not, and there never has been, any effective outfall. Sect. 13 of the Public Health Act provides, as is well known, that: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto"—with certain exceptions which I need not deal with at the moment—"shall vest in and be under the control of such local authority." Perhaps I should state at once that the first exception is: "Sewers made by any person for his own profit." I mention this only for the purpose of saying that upon the authorities Mr. Scholefield agreed that in this case the defendants cannot allege in a Court of first instance that the plaintiff's works come within that exception, and accordingly that point can only be open in some higher tribunal. Now what does the section mean when it says: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto"? At first sight I think it seems the most general provision the Legislature could possibly make. It must refer in terms to a vast number of existing sewers which were in operation

when the Public Health Act, 1875, came into being, and I doubt not that a great number of such existing sewers were highly inefficient; in other words, I think the section must apply to all sewers, good, bad or indifferent, which can properly be described as sewers, using the word in the ordinary popular sense which it connotes. It is perfectly true that in the case of *Meader* v. *West Cowes Local Board* (1) the Court of Appeal held that the pipes there in question, although they were used to drain several houses and ran into a cesspool and from thence communicated with the foreshore of a tidal river, were not a sewer or sewers within the meaning of the Public Health Act. The ratio decidendi was that the continuation of the sewerage system through the foreshore was a continuation which the owner of the property had no right to make, and must therefore be left out of account. As the result of that the Court of Appeal, consisting of Lord Coleridge, Lindley and Lopes L.JJ., came to the conclusion that they must look upon the matter as a set of pipes terminating in a cesspool on the land of the owner of the property. Such a system in the view of the Court of Appeal (no doubt rightly) is not a sewer within the meaning of s. 13 of the Public Health Act, 1875. It is I think apparent that it never was intended by that section that the hundreds and thousands of people who had their houses drained by pipes communicating with cesspools should have their pipes vested in the local authority, even though such pipes did in fact drain more than one building. It necessarily followed from the fact that mere pipes communicating with cesspools on private land are not within s. 13, that in such a case as *Meader* v. *West Cowes Local Board* (2) there was simply a somewhat elaborate system of pipes draining a number of houses and communicating with a somewhat special sort of cesspool. As soon as it was held that the continuation through the foreshore must be wholly shut out of account, because there was no right to make that communication, *Meader* v. *West Cowes Local Board* (2) became one of the simple cases where, according to the view of the Court, there was no sewer

(1) [1892] 3 Ch. 18. (2) [1892] 3 Ch. 18, 25.

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involved at all. As Lindley L.J. (as he then was), on p. 25 of the report, said: "Can a pipe which leads nowhere be a sewer?" By "leading nowhere" he meant no doubt a pipe without an outfall, and I think, reading the judgment of Lord Coleridge, it is apparent that in his opinion and in the opinion of the Court a pipe, however many houses it drains, leading to no outfall is not a sewer within the meaning of s. 13. Mr. Scholefield invites me to take a further step, and to say that not only must there be an outfall, but that the outfall must be of an effective character. By that he means that the outfall must be one which does not contravene the provisions, in this case, of the Thames Conservancy Acts in force at the time, to which I have been referred, and in every case I presume does not lead to pollution which would be pollution within the meaning of the Rivers Pollution Act. In the present case the River Mole, a tributary of the Thames, is within the Thames Conservancy Acts.

Now I am unable to take that further step. I think upon the evidence here, as far as I can ascertain, not having seen the witnesses and only having had the affidavits before me, there was an outfall to the River Mole, and for some shorter or longer period the sewage did pass to the "disposal works" and thence by the pipe to that outfall; and I do not think it is possible to extend the meaning of the decision in *Meader* v. *West Cowes Local Board* (1) or to reach as a matter of construction of the words of s. 13 of the Act of 1875 the conclusion, that because such an outfall causes from time to time a certain amount of pollution of a river therefore the system as a whole is not a sewer. The fact that according to this conclusion a very unsatisfactory system may vest under s. 13 in the local authority is one from which I think there is no escape. That must have been the case with regard to a vast number of sewage systems in existence in 1875.

Accordingly my view is that this system was in 1912, when it was constructed, a system comprising a sewer together with certain works belonging thereto, and I express my opinion to that effect, as I have already said, because no doubt the

(1) [1892] 3 Ch. 18, 25.

case may go further, and it may be desirable that my view should be stated.

Now I come to the second point. The second point is that assuming the system is, as I have expressed my view that it is, a sewer together with works belonging thereto, yet that the plaintiff has no right whatever to complain in this Court of its inefficient state, and still less has a right to a mandatory order to the defendants forthwith well and sufficiently to repair that sewer. This is a point upon which I think I have the assistance of an authority which is conclusive. The point rests upon s. 299 of the Public Health Act, which provides as follows: "Where complaint is made to the Local Government Board"—now the Ministry of Health—"that a local authority has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers"—or in certain other events which I need not mention—"the Local Government Board"—now the Ministry of Health—"if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint." And the section goes on to provide: "If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty," and other consequential relief. The contention on behalf of the defendants with regard to any question of repair and maintenance is therefore that inasmuch as the statute has provided a special remedy in respect of the non-performance of a duty expressly cast by the Act upon the local authority, it follows that performance cannot be enforced in any other manner. The matter has been on several occasions before the Courts. It was decided by the Court of Appeal in *Peebles* v. *Oswaldtwistle Urban Council* (1), and by the same Court of Appeal in *Robinson* v. *Workington Corporation* (2), and finally by the House of Lords in the case of *Pasmore* v. *Oswaldtwistle Urban Council.* (3) That was a case which decided finally that

(1) [1897] 1 Q. B. 625. (2) [1897] 1 Q. B. 619.
(3) [1898] A. C. 387, 395.

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the duty of a local authority under s. 15 of the Public Health Act, 1875, cannot be enforced by an action for mandamus brought by a private person, and the only remedy for neglect of the duty is that given by s. 299 of the Act, a complaint to the Local Government Board, the authority therein mentioned. Now under s. 15 of the Act: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." The language in s. 299 refers to a complaint of default in the maintenance of existing sewers. That refers one back to s. 15, and it is by a mere accident that one section refers to an obligation to repair and the other to a default in maintaining. In my view they refer to the same thing, and it is apparent from the decision I have mentioned that the only remedy the plaintiff has in regard to the deficient condition of the northern system is to apply, not as a private individual, but on behalf of the whole of the persons in the district, to the Ministry of Health under s. 299. The particular jurisdiction is "to call upon the whole district to reform their mode of dealing with sewage and drainage"—I am quoting from Lord Halsbury [1898] A. C. at p. 395—and as he says such a remedy "should not be open to the litigation of any particular individual, but should be committed to a Government department." I should perhaps add this: that upon the materials before me it would be impossible for me to come to the conclusion that the defendants were under any liability to repair, because I am not at all clear that this is not a case where the system is such that in fact the work has been done in such a defective manner and the system has been laid down with such defects that what would really be required is a complete reconstruction of the whole thing. In that case, according to the decision in *Reg.* v. *Epsom Union* (1), a case decided not under the Public Health Act, but under the Nuisances Removal Act, it was held that the word "repair" did not mean reconstruction, and

(1) 8 L. T. 363.

the Court held that where an entirely new set of works was required it did not fall within the range of the word "repairs," and was not an obligation on the local authority. I only say that in passing, because the conclusion to which I have come, as I have already said, is that I have no jurisdiction to deal with the matter of the alleged defects of this system of drainage, although, as I have indicated, I have come to the conclusion that as a matter of law it is a sewer.

Now what ought I to do on the present motion? I am invited on these materials to make a declaration to the effect that the northern system has vested in the defendants under the provisions of s. 13 of the Public Health Act, 1875. In other words, disregarding the fact that the matter is before me on motion, which I am quite willing to do in a case of this sort, I am asked to make a merely declaratory judgment, and it is said that I ought to make it under the provisions of Order XXV., r. 5, which provides that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make a binding declaration of right whether any consequential relief is or can be claimed or not. I may observe that it is well settled that the jurisdiction is one which should be exercised with great caution where no special relief is claimed. It has also been held by the House of Lords that a declaration ought not to be made when the substance of the declaration is a matter exclusively committed to the jurisdiction of some Court other than the High Court. That was decided in *Barraclough* v. *Brown*. (1) I am not quite satisfied that the present case falls within the decision of *Barraclough* v. *Brown* (1); but it does seem to me that it would be a strange thing to make a declaration in the present case. Mr. Gavin Simonds invites me to make it, because he says it is a condition precedent to his clients being able to make an effective appeal to the Ministry of Health under s. 299 of the Act of 1875. I am not satisfied that that is so. I think it may very well be that if his clients make a complaint under s. 299 it may be met in a number of

(1) [1897] A. C. 615.

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ways which will preclude any necessity for the Ministry to make up their minds as to whether I am right or wrong in the view I have expressed as to whether these particular works have vested under s. 13. For example, it is in evidence before me that the local authority is already moving to lay down a completely new and efficient system of drainage and sewers, and it may very well be that the Ministry of Health would approve an entirely new system and care not two straws whether the old, obsolete and non-working system has or has not vested in the local authority. Further, it is conceivable that, quite apart from that, the Ministry might take the view that as soon as it is admitted that the present system, whether it be vested in the local authority or not, is inefficient, it is quite irrelevant to determine whether it is vested in the local authority. If the local authority assert that they cannot make use of it, and further, that they have grounds for thinking that owing to its completely inefficient state they are not bound in any way to repair it, and that it is a system which it would be useless and a waste of time to repair, in such a case I imagine the Ministry might well say: "We are not going into the question at all; it seems to us artificial, and will lead to no practical result." Further I think, and I have good grounds for thinking it on authority which has been cited to me, that if it becomes relevant in the performance of the duty cast upon the Ministry of Health under s. 299 to determine whether an alleged sewer vests in the local authority under s. 13, the Ministry of Health is bound to determine it. True, there is a note in a well known text-book to which I have been referred, in which it is said that, in cases where there is a dispute, whether a sewer vests in the local authority under s. 13, the Ministry will not settle this question upon a complaint of default; but no authority is cited. It seems to me that if it is necessary in the first instance to decide whether a system of sewerage or drainage is vested in the local authority or not, the Ministry is bound to determine it.

I am therefore not satisfied that any declaration is necessary under s. 299. But moreover what weighs with

me in the matter is that the right in question which the plaintiff seeks to have set up by a declaratory order is not a private right at all. The plaintiff has no personal right to have sewers kept in proper condition. It is a matter, as Lord Halsbury says, for the whole district; it is a matter committed to the special jurisdiction of a department which is a Government department, who have to act, not with regard to the interests of any particular individual, but with regard to the interests of the district generally. I am not aware that any Court has ever in such a case made a declaration at the suit of a member of the public, and still less in a case where, as I have said, I am not satisfied that any real principle of justice requires the Court to determine the matter. The real substance of this action, it seems to me—and the motion shows it—was a claim to compel the defendants to repair this inefficient and obsolete system, which the defendants up to now at any rate have never been called upon to repair. I think in substance the action fails, and must be dismissed with the usual consequences.

Solicitors: *Monier-Williams & Milroy; Gard, Lyell & Co., for A. R. Cotton, Epsom; Cohen & Cohen.*

A. W. C.

MAUGHAM J.

1928

Dec. 6.

In re HOBSON, HOUGHTON AND COMPANY, LIMITED.

[1928. H. 5614.]

Company—Will—Bequest of Residue to Executors—Shares comprised in Residue—Appointment of Additional Trustee of Will—Transfer of Shares by Trustees to Selves and Additional Trustee—Refusal to rectify Register—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

Articles of association restricting transfer of shares must be so construed as not unreasonably to prevent shareholders from fairly and reasonably exercising their powers as members of the company.

A testator appointed his wife, a son, and two other persons executors and trustees of his will, whereby he bequeathed his residuary estate to the trustees on trust to sell and convert and to hold the proceeds, after the wife's death, upon trust as to one third thereof for the said son, and as to the remaining two thirds for the other children of the testator alive at the testator's death. The residue included shares in the company, some in the testator's name, the remainder in the name of another as his nominee or as trustee for him. The will was proved by the widow and the son only. They caused these shares to be registered in their own names without qualification, as the articles of the company disqualified transferees from receiving notice of or voting at meetings. Later, they appointed an additional trustee of the will: and in order to vest the shares jointly in them and him, all three executed a transfer. This was presented to the company for registration, but registration was refused on the ground that the restrictions on transfer imposed by the articles, and set out at p. 301 below, applied:—

Held, that the transfer could be justified under the articles.

Burns v. *Siemens Brothers Dynamo Works, Ld.* [1919] 1 Ch. 225 followed.

MOTION.

The testator at the date of his death was beneficially entitled to 1800 fully paid ordinary shares in the company registered in his name, and to fifty like shares registered in the name of another as his nominee or as trustee for him. He died on December 15, 1924, having by his will, dated October 29, 1924, appointed his wife, his son John Dickson Houghton, and two other persons, executors and trustees thereof. The will was proved on August 18, 1925, by the widow and the said son. After giving certain pecuniary and specific legacies not comprising any of the said shares, the testator bequeathed all his real and personal estate not thereby otherwise disposed of to the trustees upon trust to sell and convert the same and to stand possessed of the proceeds of

sale and conversion (in the will thereafter called the "residuary trust fund") "from and after the death of my said wife in trust as to one third part thereof for my son the said John Dickson Houghton . . . . and as to the remaining two third parts thereof for all or any my children or child other than my said son living at my death."

Among the articles of the company dealing with transfer of shares were the following: 12. "No persons shall be recognized by the company as holding any share upon any trust, and the company shall not be bound by or recognize any equitable, contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the Registered Holder." 34. "Any share may be transferred by a member to any son or daughter or wife or husband, son-in-law or daughter-in-law, nephew or niece, or grandchild of such deceased member, or to any trustees or trustee for such persons or any of them, and any share of a deceased member may be transferred by his executors or administrators to any son or daughter, widow or widower, son-in-law or daughter-in-law, nephew or niece, or grandchild of such deceased member, or to any trustees or trustee for such persons or any of them, and the restrictions on transfer hereinbefore contained shall not apply to any such transfer." 43. "Any person becoming entitled to a share in consequence of the death or bankruptcy of any member may, upon producing such evidence of title as the directors shall require, and subject as hereinafter provided, either be registered himself as holder of the share, or elect to have some person nominated by him registered as the transferee thereof." 44. "If the person so becoming entitled shall elect to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. For all purposes of these presents relating to the registration of transfers of shares such notice shall be deemed to be a transfer, and the directors shall have the same power of refusing to give effect thereto by registration

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as if the event upon which the transmission took place had not occurred, and the transfer were a transfer executed by the person from whom the title by transmission is derived." 46. "A person entitled to a share by transmission shall be entitled to receive and may give a discharge for any dividends, bonuses, or other moneys payable in respect of the share; but he shall not be entitled to receive notices of or to attend or vote at meetings of the company, or, save as aforesaid, to any of the rights or privileges of members unless and until he shall have become a member in respect of the shares."

The widow and son produced the probate to the company for a note of it to be entered in the register. Under art. 46, they were not entitled either to receive notice of or to vote at meetings of the company. They therefore, pursuant to art. 44, caused the said shares to be registered in their names without qualification, i.e., not as transferees. The 1800 shares were so registered towards the end of 1925, and the fifty which had stood in the name of Hutchinson in or about April, 1926. Later, they decided to appoint an additional trustee of the will, and, as executors, to transfer to themselves and to him as trustees thereof the 1850 shares. Accordingly, by a deed dated January 25, 1928, between themselves of the one part and one Henry Trenchard Nicholls of the other, they appointed the said Henry Trenchard Nicholls as trustee of the will jointly with themselves. In order to vest the 1850 shares as part of the testator's estate in the widow, the son, and the said Henry Trenchard Nicholls as trustees of the will, a transfer of the shares to them as trustees was executed by all three, and on January 31, 1928, was presented, with the certificate for the shares and the registration fee, to the company for registration. The company refused registration, and this motion asked that the register might be rectified by substituting thereon for the names of the widow and son the names of themselves and the said Henry Trenchard Nicholls as holders of the 1850 shares.

F. J. Kerr for the applicants. The widow and son are executors, and in that capacity they hold the shares, which

form part of the testator's estate. The executors of a member of the company may transfer that member's shares to trustees for persons of the class prescribed by the articles, and they may do so either before or after registration. Only a very highly technical construction of art. 34 could justify the vetoing of the transfer in the present case: *Burns* v. *Siemens Brothers Dynamo Works, Ld.* (1) The transfer should be sanctioned under either the first or the second part of art. 34. Both parts allow the transfer, and until the executors have handed over these shares, their office is not complete.

John Bennett for the respondent company. The executors were put on the register pursuant to their rights under art. 44. They have now ceased to be executors, and are trustees: *Buchan's Case.* (2) Executors on the register become personally liable as ordinary members. But the company takes no notice of any trust. Under the first part of art. 34, a member of the company may transfer shares to a trustee for himself. But the executors must alter their character from that of executors to that of trustees before they can appoint a new trustee. The shares become divested from them as executors, because they hold a special position which, so far as the company is concerned, they must preserve.

MAUGHAM J. [after stating the facts:] The motion raises a somewhat singular point on the true construction of a number of articles of the company which restrict the transfer of shares. The deed whereby the widow and son appointed Mr. Nicholls an additional trustee recites that the original trustees have from time to time realized properties of the testator and out of the proceeds of such realization have paid the testator's funeral and testamentary expenses and debts. It is therefore contended by the company that the proposed transfer does not come within art. 34, but is a transfer by trustees of the will to themselves and another trustee and is therefore outside that article. In justification of the transfer it is said that it does come within that article as it is a transfer by "executors of a deceased member to trustees for sons or daughters" or is a transfer by "members to trustees for

(1) [1919] 1 Ch. 225, 231. (2) (1879) 4 App. Cas. 549.

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sons or daughters of themselves or of one of them." Under art. 12, the widow and son are members of the company. But under art. 34 the company is right in inquiring whether that article does cover the transfer. I find that, on the whole, the transfer may be justified, certainly under the second part of art. 34, and possibly under the first part. It is true that a trustee has been appointed and that the appointment has been made by the widow and son in their capacity as trustees. But that fact is not an indication that they have entirely ceased to be executors. There is a duty still to be performed by them—namely, the duty of vesting these shares in the present trustees. Therefore, bearing in mind the principle applied in *Burns* v. *Siemens Brothers Dynamo Works, Ld.* (1) that articles of association should be so construed as not unreasonably to prevent shareholders in a company from enjoying a fair and reasonable exercise of their powers as members of the company, I find, on the true construction of art. 34, that the transfer may be justified. On a liberal interpretation of that article, it may be justified either as being by executors as such to "trustees for the widow and sons and daughters" of the testator, or as being by members to themselves and another as trustees for themselves. The motion therefore succeeds and the respondent must pay the costs.

Solicitors: *Grundy, Kershaw, Samson & Co., for Robert Davies & Co., Warrington; Hedley Norris & Co., for Cunliffe, Greg & Co., Manchester.*

(1) [1919] 1 Ch. 225, 231.

K. R. A. H.

ASTBURY J.

1928

Nov. 9; *Dec.* 6, 7.

LONDON COUNTY COUNCIL *v.* GREENWICH CORPORATION.

[1928. L. 889.]

Burial Ground—"Disused burial ground"—Cemetery set apart as a Whole—Part subsequently disused—Part still used—Sale under the Authority of an Act of Parliament—Admiralty Lands and Works Act, 1864 (27 & 28 *Vict. c.* 57), *s.* 15—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 2, 4 *and Schedule.*

Where a piece of land has been effectually set apart for the purposes of interment it becomes a "burial ground" within the aggregate definition of the Metropolitan Open Spaces Act, 1881, the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887, and any portion for which the purposes of interment are subsequently abandoned becomes a "disused burial ground" within the similar definition, although interments still go on in other parts of the cemetery.

In re Ponsford and Newport District School Board [1894] 1 Ch. 454 and *In re Bosworth and Gravesend Corporation* [1905] 1 K. B. 403; 2 K. B. 426 applied.

Nicholl v. *Llantwit Major Parish Council* [1924] 2 Ch. 214 distinguished.

A sale of a "disused burial ground" by the Admiralty under the general powers of the Admiralty Lands and Works Act, 1864, s. 15, is not a sale under the authority of an Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884, and consequently the disused burial ground still remains subject to the building prohibitions of s. 3.

In re Howard Street Congregational Chapel, Sheffield [1913] 2 Ch. 690, a case under the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), applied.

Attorney-General v. *London Parochial Charities* [1896] 1 Ch. 541, a case under the specific powers of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), distinguished.

WITNESS ACTION.

By a conveyance on sale dated April 21, 1857, a piece of land at Greenwich was conveyed to the Greenwich Hospital Commissioners to be used for the purposes of a burial ground for Greenwich Hospital.

The Home Secretary's approval to this new burial ground, required by s. 9 of the Burial Act, 1852 (15 & 16 Vict. c. 85), was given by a letter of October 9, 1856, addressed to Greenwich Hospital.

The plot consisted of an approximately rectangular piece of land containing about 6 acres with a narrow strip from the north-west corner to the Woolwich High Road.

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After the purchase the property was fenced in by the Commissioners, the rectangle being used for interments and the strip, with an entrance lodge, as a means of approach. The rectangle had no physical divisions. The property was known as the Royal Hospital Cemetery.

By a conveyance on sale dated December 31, 1926, and made between the Admiralty of the first part, the Treasury of the second part and the Greenwich Corporation of the third part, after reciting the conveyance of April 21, 1857; the Admiralty Lands and Works Act, 1864; the Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89); and the Greenwich Hospital Act, 1885 (48 & 49 Vict. c. 42); and that the 6 acres were now vested in the Admiralty in fee simple in possession free from incumbrances. And reciting that by virtue of the powers conferred on them by the said Acts or any of them and of all other powers them enabling the Admiralty (with the Treasury's consent) had agreed to sell the 6 acres to the Greenwich Corporation subject to the reservation and to the restrictive covenants thereinafter contained. It was witnessed that in pursuance of the said agreement and for the consideration therein mentioned the Admiralty, as trustees in exercise of the powers or authorities for this purpose vested in them by virtue of the Greenwich Hospital Acts, 1865 to 1921, and the other recited Acts or any of them and of every or any trust, power, or authority enabling them in that behalf, with the consent of the Treasury, granted the parcel of 6 acres delineated in the plan and thereon coloured pink, green, brown and blue, which parcel of land was then used for the purposes of a cemetery and was unconsecrated, unto the Greenwich Corporation in fee simple subject as to the pink, green and brown lands to the reservation and covenants in the schedule.

The schedule reserved to the Admiralty in perpetuity the right to use the pink land, hitherto used for burial purposes, as a burial ground.

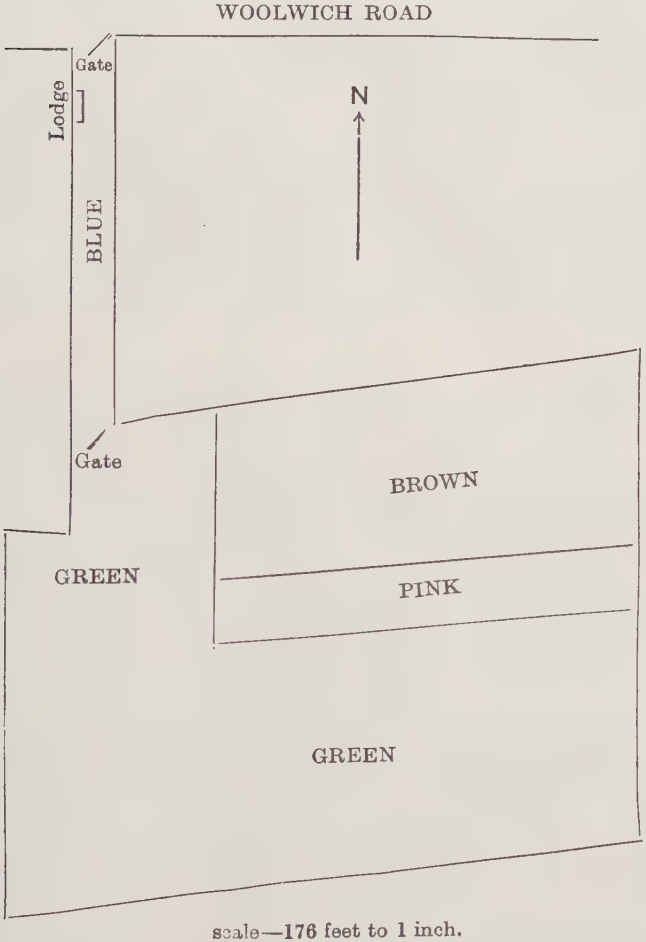
The purchasers covenanted:—

(*a*) Subject to the above reservation to use the pink and green lands for an open space and not to erect or allow to be

erected any building thereon (except shelters) without the Admiralty's written consent.

(*b*) To use the brown land (which had not yet been used as a burial ground) for one or more of the following purposes only—viz. :—

(1) Any public service carried on under the Maternity and Child Welfare Acts or Public Health Acts or under the authority of the Minister of Health.



scale—176 feet to 1 inch.

(2.) Any public service carried on under the Public Library Acts.

(3.) As an open space.

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A reduced tracing of the site plan is added for clearness. The pink land was now alone used for burials. There were still no physical boundaries between the pink, green and brown lands.

Some time before February, 1928, the Greenwich Corporation began erecting a welfare centre on the brown land and proposed to erect houses on the blue land.

On April 27, 1928, the plaintiffs, as the authority for enforcing the provisions of the Disused Burial Grounds Act, 1884, brought this action, claiming :—

1. A declaration that the site of the welfare centre on the brown land was or was part of a disused burial ground, and so also was the blue land, and that the erection on any part of the brown or blue land of any building not permitted by s. 3 of the Disused Burial Grounds Act, 1884, was unlawful.

2. An injunction as to the brown or blue lands.

3. A mandatory order as to the building so far as erected on the brown land.

4. Costs.

The defendants contended that the brown and blue lands had never been set apart for interments. If however the brown, blue, pink and green lands were to be regarded as one piece, the fact that there were still interments in the pink prevented any part of the whole piece from being a disused burial ground. In any case the land was conveyed to the defendants by the Admiralty under the powers of the Admiralty Lands and Works Act, 1864, and the Greenwich Hospital Acts, 1865 and 1885, and was therefore exempted by s. 5 of the Disused Burial Grounds Act, 1884.

In reply to the last point, only raised by amendment of the pleadings at the trial, the plaintiffs relied on the Greenwich Hospital (Disused Burial Ground) Act, 1925 (15 & 16 Geo. 5, c. 58), as establishing that a burial ground sold or disposed of by the Admiralty under those Acts was not within the exception in s. 5.

Hon. R. Stafford Cripps K.C. and *Droop* for the plaintiffs. The Disused Burial Grounds Act, 1884, provides (s. 3) that after the passing of this Act [August 14, 1884] "it

shall not be lawful to erect any buildings upon any disused burial ground," with immaterial exceptions; but (s. 5) nothing in this Act shall apply to "any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

The Metropolitan Open Spaces Act, 1881, s. 1, as amended by the Open Spaces Act, 1887, ss. 2, 4 and Schedule, provides that the term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and s. 4 of the 1887 Act provides that the expression "disused burial ground" shall mean any burial ground which is no longer used for interments.

The effect of these definitions is that if a whole piece of land is effectually set apart for interments, as this cemetery clearly was, any portion for which that purpose is subsequently abandoned is a disused burial ground: *In re Ponsford and Newport District School Board* (1); *In re Bosworth and Gravesend Corporation.* (2)

[ASTBURY J. Is there anything to forbid building on a burial ground in actual use?]

It can only be used for the purposes authorized by the special Act or the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 9, which is incorporated by s. 40 of the Burial Act, 1852.

The new point just raised under s. 5 must be dealt with in our reply.

Montgomery K.C. and *William Allen* for the defendants. First, the brown and blue lands were never effectually set apart for interments. Even if there was any initial intention to use them for that purpose, that intention was obviously abandoned. The case is analogous to *Nicholl* v. *Llantwit Major Parish Council.* (3)

Secondly, if, as indicated by Lindley L.J. in the *Ponsford* case (4), the setting apart must be looked at as a whole, the whole cemetery is still a used burial ground, as the pink land

(1) [1894] 1 Ch. 454, 462.
(2) [1905] 1 K. B. 403, 409; 2 K. B. 426, 436.
(3) [1924] 2 Ch. 214, 220.
(4) [1894] 1 Ch. 454, 464.

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is still used for burials. The 1884 Act has therefore no application.

Thirdly, this land was acquired and sold by the Admiralty under the Admiralty Lands and Works Act, 1864, and the Greenwich Hospital Act, 1865, and is therefore exempted by s. 5 of the 1884 Act.

The preamble to the Admiralty Act recites that it is expedient to make provision for the acquisition by the Admiralty, by agreement, of lands required for the public service and respecting the use of lands so held, and the disposition thereof when no longer so required.

Sect. 15 provides that where any lands purchased or taken by the Admiralty under this or any special Act appear to the Admiralty to be no longer required to be held by them for the public service, the Admiralty may, with the previous consent of the Treasury, sell the same.

Sect. 27 provides that nothing in this Act shall take away or prejudicially affect any power, right, or authority that would or might have been vested in or exercised by the Admiralty if this Act had not been passed.

The Greenwich Hospital Act, 1865, provides (s. 22) that all lands then settled on or vested in or held by or in trust for the Greenwich Hospital Commissioners shall thenceforth by virtue of this Act remain and be settled on and vested in the Admiralty for such estate or interest as the Greenwich Hospital Commissioners have therein.

Sect. 23 provides that all lands vested in the Admiralty by virtue of this Act shall be held in trust for Her Majesty for the exclusive benefit of Greenwich Hospital; and subject thereto and to the other provisions of this Act, the same shall be held in the same manner and with, under, and according to the same powers, restrictions, and provisions as lands vested in the Admiralty under the Admiralty Land and Works Act, 1864.

The Greenwich Hospital Act, 1885, s. 6, is only directed to procedure.

Now the Admiralty Lands and Works Act, 1864, is obviously dealing with particular lands acquired and sold under that

Act, and is in pari materia with Michael Angelo Taylor's Act, a sale under which is within the exception in s. 5: *Attorney-General* v. *London Parochial Charities.* (1)

A sale of charity lands authorized by the Charity Commissioners under s. 24 of the Charitable Trusts Act, 1853, is, of course, in quite a different position: *In re Howard Street Congregational Chapel, Sheffield.* (2)

It is true that on August 7, 1925, Parliamentary sanction was obtained for a building lease of another disused burial ground by the Admiralty to the Seamen's Hospital Society: see the Greenwich Hospital (Disused Burial Ground) Act, 1925. It was possibly open to argument that a lease, whether for ninety-nine years or for a week or a day, was not a sale or disposition within s. 5, and the Parliamentary sanction was obtained ex abundanti cautela as provided by the contract. The Act cannot be treated as a legislative declaration that no sale under the Admiralty Act is within s. 5.

Hon. R. Stafford Cripps K.C. in reply.

First, on the facts the whole block was effectually set apart for interments. In *Nicholl* v. *Llantwit Major Parish Council* (3) it was never effectually set apart. The observations of Tomlin J. on the decisions (not dicta) in the *Ponsford* case (4) and the *Bosworth* case (5) were purely obiter.

Secondly, in the *Ponsford* case (6) North J. held (7) that the disused part was a disused burial ground. Lindley L.J. (8) held that the cemetery had been set apart as a whole, and could not be built upon. Kay L.J. (9) dealt specifically with the disused portion, and held it was a disused burial ground. This is borne out by the *Bosworth* case (10), and on this point the authorities are conclusive.

Thirdly, it is said that the land was acquired and sold under the authority of the Admiralty Lands and Works Act, 1864, and is consequently outside the Disused Burial

(1) [1896] 1 Ch. 541, 545, 548.
(2) [1913] 2 Ch. 690.
(3) [1924] 2 Ch. 214, 220.
(4) [1894] 1 Ch. 467.
(5) [1905] 1 K. B. 409.
(6) [1894] 1 Ch. 454.
(7) [1894] 1 Ch. 462.
(8) [1894] 1 Ch. 464.
(9) [1894] 1 Ch. 465–468.
(10) [1905] 1 K. B. 403, 409; 2 K. B. 426, 436.

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Grounds Act, 1884. But the Admiralty, as representing the Crown, always had common law rights of acquisition and disposal, and these are preserved by s. 27.

It is clear from the preamble that the so called powers are mere machinery for regulating the exercise of those old powers. Sect. 15, for instance, imposes the previous consent of the Treasury before a sale can be made, just as in the *Howard Street* case (1) the consent of the Charity Commissioners was necessary to a sale.

In the case of Michael Angelo Taylor's Act a particular piece of land is acquired after a necessary preliminary adjudication that it is required for the improvement authorized by the Act, and it is that land or a portion thereof that the public bodies are authorized to resell. That is no doubt a sale under the authority of an Act of Parliament within s. 5 of the 1884 Act: *Attorney-General* v. *London Parochial Charities*. (2)

But the Admiralty Act, 1864, is not an Act of this sort at all. Any conceivable doubt on the point is really removed by the Greenwich Hospital (Disused Burial Ground) Act, 1925, which in effect recites that the Admiralty could not lease a certain disused burial ground without the authority of Parliament. A lease is clearly a disposition within s. 5 of the 1884 Act.

ASTBURY J. [after stating the facts and referring to the relevant statutes:] The defendants rely on three points: First, they say that the brown land has never been set apart for interments within the statutory definition of burial ground. Secondly, they say that the brown land is not a disused burial ground, because it is an unseparated part of a whole burial ground partly still used for interments. Thirdly, they say that the brown land was sold under the authority of an Act of Parliament, and is therefore exempted by s. 5 of the Disused Burial Grounds Act, 1884.

On the first point there can be no doubt that the whole 6 acre plot was set apart for the purposes of interment. The

(1) [1913] 2 Ch. 690. (2) [1896] 1 Ch. 541, 545, 548.

whole was expressly bought for those purposes. It was fenced off and separated from the surrounding land. For more than half a century it has been used as a cemetery, and on the facts it is hopeless to contend that it was not set apart for the purposes of interment within the statutory definition of burial ground. Therefore it was as a whole and in every part a burial ground.

The second point relied on by the defendants is that the brown land is not a disused burial ground, but part of a burial ground in actual use. They rely on certain expressions of Lindley L.J. in the *Ponsford* case (1) referring to the necessity of looking at a burial ground as a whole for the purpose of seeing whether it has been set apart as such, as distinct from treating it as sub-divided into bits for the purpose of seeing whether each bit has been so set apart. But I do not think that Lindley L.J. meant what the defendants attribute to him. They say, looking at the plot as a whole, part of it is still used as a burial ground; the whole therefore remains a burial ground, and no part can be a disused burial ground.

That is a fallacy. The whole plot was one undivided cemetery up to the conveyance of December 31, 1926. That conveyance for the first time treated it as divided into the pink, green, brown and blue lands. That was the first separation of the brown land. The pink was reserved as a burial ground for the future, and the only question is whether the brown is now a disused burial ground or part of a disused burial ground.

I must now refer more in detail to the *Ponsford* case. (2) There was a cemetery at Newport, in part of which there had been interments, but there had been none in the green land. By an Order in Council in 1878 the whole cemetery was closed for burials, but by a further Order of 1890 that Order was varied, and it was ordered that burials should be discontinued, except in the green land. No interments took place in the green, and on an attempted sale the purchasers objected that the sale was bad under s. 3 of the 1884 Act. The case related entirely to the green land. North J. held

(1) [1894] 1 Ch. 464. (2) [1894] 1 Ch. 454.

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that it was a disused burial ground. He said (1): "The Metropolitan Open Spaces Act, 1881, s. 1, contains this definition: 'The term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment. . . . .' It is to be observed that the expression is not 'used for,' but 'set apart for,' the purpose of interment; and it seems to me that the whole of the land bought by the company was 'set apart' for the purposes of interment." He came to the conclusion that the green land was included in the burial ground and was in consequence a burial ground, and not being any longer used for interments, and being separated from the rest, it was a disused burial ground within the 1884 Act. He said (1): "To my mind, the land coloured green is a disused burial ground, and the prohibition against building applies."

It is very difficult to see any distinction between that case and the present.

In the Court of Appeal North J.'s views were affirmed. The passages in Lindley L.J.'s judgment (2) relied on by the defendants related to the question of setting apart, and do not affect the present point. He said that in considering the question of setting apart the land must be regarded as a whole and not bit by bit, and if the whole was set apart as a cemetery it was a burial ground within the 1884 Act. He did not in any way differ from North J.'s view that the green land had become a disused burial ground.

Kay L.J. dealt with this point rather more fully. He said (3): "This burial ground—the whole of it—was bought by the cemetery company, for the purpose of providing a place of interment for the dead. . . . . The unused portion of the ground"—that is the green—"has now been divided from the rest of the cemetery by a wall, and the question is whether any building can be erected on that unused portion." Later on he said (4): "Thus, the effect of that is, that the term means any ground which has been at any time set apart for the purposes of interment, whether interments have

(1) [1894] 1 Ch. 462.
(2) [1894] 1 Ch. 464.
(3) [1894] 1 Ch. 465.
(4) [1894] 1 Ch. 467.

taken place in it or not; because the words in the original Act of 1881 requiring that, to make the ground a 'burial ground,' interments must have taken place within it, are expressly repealed. Therefore the term includes any ground set apart for interments, and in which interments have not taken place. . . . . Now we have to apply this state of the law to a particular piece of ground. This piece of ground, coloured green on the plan, was . . . . closed by an Order in Council, and burying in it . . . . prohibited. Then, afterwards, another Order . . . . was made . . . . allowing burials in this piece of ground; but no burials have ever taken place in it, and therefore it cannot be denied that it is in fact a burial ground which has not been used for burials. But it is said that it never was set apart as a burial ground and therefore cannot be termed a 'disused burial ground.' The meaning now to be attributed to the term 'disused burial ground' in the Act of 1884—namely, that it includes a piece of land set apart for interments, but in which interments have not taken place—makes that argument absolutely impossible. This ground was set apart as distinctly as any ground could be, though it is ground in which no burials have ever taken place. I cannot escape the conclusion that this ground is within the express words of the Acts of Parliament; that this was ground set apart for interments; although no interments have ever taken place in it, this is, therefore, a disused burial ground within the Act of 1884, and the restriction in the Act of 1884 applies to this ground. Unless that is the conclusion to be drawn from the words of this Act of 1884, the result would be this—that a piece of ground in the middle of a cemetery, or in any part of a cemetery, in which there may have been no burials, cannot be treated as a disused burial ground."

That is a conclusive decision of the Court of Appeal on the exact point.

In the *Bosworth* case (1) it was also pointed out that a separated part of a burial ground may become a disused burial ground within the 1884 Act.

(1) [1905] 1 K. B. 403, 409; 2 K. B. 426, 436.

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In *Nicholl* v. *Llantwit Major Parish Council* (1), relied upon by the defendants, Tomlin J. held (and I respectfully agree with him) that a piece of land purchased for the purpose of making it into a cemetery, but found utterly unfit for a burial ground, and with no further step for that purpose beyond the original purchase, had not been set apart as a burial ground within the Act. The defendants however rely on a passage in the judgment where Tomlin J. said (2): "I may add that with reference to the definition of 'disused burial ground' in s. 4 of the Act of 1887 my attention has been called to observations on it in *In re Ponsford and Newport District School Board* (3) and *In re Bosworth and Gravesend Corporation.* (4) The facts in both these cases were entirely different, and it does not seem to me that the particular observations to which I was referred were directed to anything material to the determination of those cases; and for my part I should not be prepared to accept without much more argument the view that the definition of a 'disused burial ground' as a 'burial ground which is no longer used for interments,' can include a burial ground which has never been used for interments."

I do not think that there is anything in the *Ponsford* case (3) or the *Bosworth* case (5) to suggest that a piece of ground that has never been a burial ground, though originally intended therefor, can become a disused burial ground. Tomlin J. was referring to certain passages where it had been held that the words "no longer used for interments" in the Open Spaces Act, 1887, s. 4, might in an appropriate case mean land in which no interments had in fact taken place; in other words, that where a cemetery was actually used for interments, a particular part not so used would be a part "no longer used" for interments within the statutory definition. But there is nothing in the *Ponsford* case (3) or the *Bosworth* case (5) referring to land never ab initio set apart for interments.

(1) [1924] 2 Ch. 214.
(2) [1924] 2 Ch. 220.
(3) [1894] 1 Ch. 454, 467.
(4) [1905] 1 K. B. 403, 409.
(5) [1905] 1 K. B. 403, 409; 2 K. B. 426, 436.

The defendants' third point turns on s. 5 of the 1884 Act. They say, and in a sense truly, that this land was sold to them under the authority of an Act of Parliament. Settled land sold by a life tenant is in a similar sense sold under the authority of an Act of Parliament, but s. 5 clearly cannot include a case like that. It provides that nothing in the Act shall apply—not to any sale by any person entitled under the authority of an Act of Parlament to sell the land in question, but—to any burial ground which has been sold or disposed of under the authority of an Act of Parliament. In other words, the Act of Parliament referred to must relate to the land and not to the power or authority of the person dealing with the land. Otherwise all sorts of general statutory authority might be called in aid for the purpose of escaping s. 3 of the 1884 Act.

The defendants rely on *Attorney-General* v. *London Parochial Charities*. (1) In that case land forming part of a disused burial ground was acquired by the Commissioners of Sewers under Michael Angelo Taylor's Act for the purpose of street improvements. Part of the land so acquired was afterwards resold as surplus land to the defendants who, with the consent of the Charity Commissioners, let it for building. Stirling J. held that it had been sold under the authority of an Act of Parliament.

In that case however the land in question was acquired by the Commissioners of Sewers, as well as sold by them, under the authority of Michael Angelo Taylor's Act, and before its acquisition an adjudication had to be made under that Act enabling the Commissioners to buy that specific property. That adjudication was a necessary preliminary step to the operation of the Act as to the power of acquisition and sale of the particular property.

Stirling J. said (2) that the sale was made under the provisions of Michael Angelo Taylor's Act, the effect of which provisions might be thus stated : " Certain public bodies . . . . (among which bodies are included the Commissioners of Sewers of the City of London), are thereby empowered, for

(1) [1896] 1 Ch. 541. (2) [1896] 1 Ch. 547.

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the purpose of improving the streets within their jurisdiction, to adjudge that 'any houses . . . . and hereditaments' (words of the widest import and amply sufficient to include a burial ground, whether used or disused) 'or any part thereof,' prevent them from executing a proposed improvement. Such an adjudication has been held to be a necessary preliminary to the taking of any further steps." He then proceeded to point out that the adjudication being made the bodies in question had powers of acquisition and sale. Later on he said (1) "The Commissioners derived their power to purchase, and the [St. Botolph's] Charity trustees their power to sell, from the statute. Each step was taken under and in accordance with the authority conferred by the statute, and from that authority alone the sale derived its validity. I can come to no other conclusion than that the land was sold under the authority of an Act of Parliament and that it falls within s. 5."

That judgment in no way acquiesces in the proposition that a general statutory power of sale is referred to by s. 5. All it decided was that where a particular piece of land which had been used as a burial ground had, after an adjudication, been specifically acquired and specifically resold under the express provisions of a statute, that was a sale under an Act of Parliament relating to the particular land as distinct from any general statutory power or authority of the person making the sale.

This view is borne out by my own decision in the *Howard Street* case. (2)

The only question therefore is whether the Admiralty sold this land under the authority of an Act of Parliament within *Attorney-General* v. *London Parochial Charities* (3), or whether they had general powers to sell it irrespective of any particular Act of Parliament. The position is this. It is true that s. 15 of the Admiralty Act, 1864, provides that where any lands purchased or taken by the Admiralty under this Act or under any such special Act as aforesaid of the present or any future session appear to the Admiralty to be

(1) [1896] 1 Ch. 548. (2) [1913] 2 Ch. 690.
(3) [1896] 1 Ch. 541.

no longer required to be held by them for the public service the Admiralty may sell the same with the Treasury's consent. At first sight that looks like an authority to sell the land, but s. 27 provides that "nothing in this Act shall take away or prejudicially affect any power, right, or authority that would or might have been vested in or exercised by the Admiralty if this Act had not been passed."

Now, if this Act had not been passed, the Admiralty would have had, as it always has had, the right and power under the Crown to acquire and sell property generally, and this statute merely makes provisions regulating the rights of disposition already possessed by the Admiralty.

The preamble is as follows :—

"Whereas it is expedient to make provision for the acquisition by the Admiralty, by agreement, of lands required for the public service :

And whereas it is expedient to consolidate into one general Act sundry provisions usually introduced into special Acts from time to time empowering the Admiralty to purchase particular lands for the public service by agreement or compulsorily, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several special Acts as for insuring greater uniformity in the provisions themselves :

And whereas it is expedient to make provision respecting the use and management of lands held by the Admiralty for the public service, and "—these are the important words— "respecting the disposition thereof when no longer required for the public service, ..."

It appears to me that s. 15, read with this preamble, did not give the Admiralty the right to sell this burial ground or to sell any other land. It merely imposed certain provisions and restrictions on the rights of sale they already possessed, all general rights being saved by s. 27. I am therefore unable to hold that the land in this case was sold under the authority of an Act of Parliament within s. 5 or within *Attorney-General* v. *London Parochial Charities.* (1)

(1) [1896] 1 Ch. 541.

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The plaintiffs relied on the Greenwich Hospital (Disused Burial Ground) Act, 1925. This raises a curious point. The statute was passed on August 7, 1925, i.e., about eighteen months before the present property was sold by the Admiralty to the defendants.

It recites that: "Whereas by an agreement dated November 24, 1924, ... made between the Admiralty and the Seamen's Hospital Society the Admiralty agreed to lease to the said Society certain lands . . . . forming part of Greenwich Hospital:" The agreement was in fact for a ninety-nine years' building lease, and was no doubt a "disposition" of the land by the Admiralty for that purpose. The statute then recites that "Whereas a portion of the said land is a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884, as amended by the Open Spaces Act, 1887. . . . .

And whereas under the terms of the agreement permission was given to the said society subject to the approval of the Admiralty to erect on the disused burial ground certain buildings in extension of the Dreadnought Seamen's Hospital at Greenwich:"

Then there follows this very important statutory recital: "And whereas the object aforesaid cannot be effected without the authority of Parliament:" and the statute then enacts that, "Subject to the provisions of the agreement with respect to the removal and reinterment of human remains and otherwise nothing in the said Acts shall prevent the erection of buildings on any of" the leased land.

It seems a little strange that the Admiralty having come to the conclusion in 1925 that an Act of Parliament was necessary to enable them to grant a building lease of one disused burial ground, should in the following year convey another to the defendants without any Act. The conveyance of course is perfectly harmless as far as it merely transferred the ownership of the property from the Admiralty to the defendants. The only difficulty arises from the schedule, which provides that maternity or welfare centre buildings may be erected on the brown land.

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The 1925 Act, quite apart from my view that s. 5 of the 1884 Act refers to specific and not general statutory powers, places a great difficulty in the defendants' way, and, on the third point, in my judgment, the brown land has not been sold by the Admiralty under the authority of an Act of Parliament within s. 5.

On all three points my judgment also applies to the blue land.

The plaintiffs are entitled to the declaration, injunction, and mandatory order they ask. The time for appealing will be extended to three months with a stay of the mandatory order for that period. If within the three months the defendants give notice of appeal or take steps to apply for a new Act of Parliament, the mandatory order will be stayed over the appeal or until further order. The defendants must pay the costs.

Solicitors: *T. Bullivant; H. B. Sewell & Son.*

G. R. A.

C. A.
1928
Dec. 4.

In re WILTS AND SOMERSET FARMERS, LIMITED.

[00169 of 1923.]

Industrial and Provident Society—Alteration of Rules—Ultra vires—Liability of Members to take additional Shares—Contract between Members and Society—Voluntary Liquidation—Liability to contribute—Cessation of Membership—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39).

By rule 12 of the rules of a society, registered in 1910 under the Industrial and Provident Societies Act, 1893, it was provided as follows: "Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. . . . . Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them."

By rule 23 it was provided: "If by transfer or otherwise the number of shares held by a member becomes less than the number required by rule 12 to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled, and the member shall cease to be a member."

C. A.
1928
WILTS AND SOMERSET FARMERS, *In re.*

In November, 1921, rule 12 was amended by requiring a member to hold at least five shares for every 20 acres or fraction of 20 acres, and milk producers were required to hold shares on the above acreage basis or at least five shares for every dairy cow owned by them, whichever should be the greater number of shares.

Rule 23 was amended as follows: "Rule 23, line 4—Strike out the word 'shall' [i.e., the word 'shall' preceding the words 'be repaid'] and substitute 'may at the discretion of the committee.'"

On March 25, 1922, rule 12 was further amended by substituting for "five shares" "shares of the nominal value of 5*l*."

On January 30, 1923, Wilts and Somerset Farmers, Ld., went into liquidation, and the liquidator took out a summons against five representative members of the society as respondents for the determination of the question whether, having regard to rule 12, as amended, the respondents, or some of them, and which of them, should be placed on the list of contributories. Each of the respondents joined the society before March 25, 1922:—

Held, by the Court of Appeal (affirming the decision of Romer J.), that rule 12 and its amendments were not void for uncertainty, and that the alterations made to rule 12 were binding on the respondents.

Biddulph and District Agricultural Society v. *Agricultural Wholesale Society* [1925] Ch. 769; [1927] A. C. 76 followed.

Dibble v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342 commented upon.

Decision of Romer J. [1928] Ch. 809 affirmed.

APPEALS from a decision of Romer J. (1)

On March 23, 1910, the society known as "Wilts and Somerset Farmers, Ld.," was registered under the Industrial and Provident Societies Act, 1893.

By the society's original rules and amendments it was, so far as material, provided as follows:—

(6.) Shares shall be transferable, but not withdrawable. They shall be of the nominal value of 1*l*., of which 5*s*. shall be payable on application, and the remainder in such calls as the committee may direct.

(11.) The society shall consist of the persons by whom the application for registration is signed (hereinafter called "the special members") and such other persons, societies or companies, as the committee may admit.

(12.) Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres

(1) [1928] Ch. 809.

or fraction of 40 acres above 500. In arriving at the acreage Down Land may be eliminated at the discretion of the committee. Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them, societies or companies which are members shall hold at least five shares. Societies (other than the Agricultural Organization Society, Ld.) or companies which are members, shall hold at least five shares.

(13.) The total number of shares held by any members (other than a registered society) shall not exceed 200*l.* in nominal value.

(18.) No transfer of shares shall be valid unless the committee's consent has been obtained thereto, and the transfer is made in the form provided in rule 20. A non-member to whom shares are transferred with the committee's consent shall thereby become a member of the society, provided he holds a sufficient number of shares to qualify for membership in accordance with rule 12.

(22.) The committee may, on the application of a member, in case of distress or removal from the district or for other good reason, repay on any share held by him a sum not exceeding the amount paid up and cancel the share.

(23.) If by transfer or otherwise, the number of shares held by a member becomes less than the number required by rule 12 to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled and the member shall cease to be a member.

(64.) The rules may be amended by resolution of a three-fourths majority at a special general meeting. No amendment of rules shall be valid until registered.

By an amendment registered on November 14, 1921, the whole of rule 12 was rescinded and the following rule substituted therefor: "Individual members shall hold at least five shares for every 20 acres or fraction of 20 acres farmed by them up to 500 acres and at least three shares for every 40 acres or fraction of 40 acres above 500. In arriving at the acreage Down Land may be eliminated at the discretion of the committee. Milk producers shall hold shares

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on the above acreage basis or shall hold at least five shares for every dairy cow owned by them whichever shall be the greater number of shares."

Rule 23 was also altered by striking out the word "shall" before the words "be repaid" and substituting the words "may at the discretion of the committee."

On December 21, 1921, the following further alterations to the rules were registered: "Rule 6. Strike out the words following 'drawable' in line two and substitute therefor: 'They shall be of the nominal value of 6*s.* 8*d.*, which shall be payable upon application'"; and, "After rule 6, insert the following additional rule: 'Rule 6A. The nominal value of each of the issued and fully paid shares of the society shall be reduced from the sum of 1*l.* to the sum of 6*s.* 8*d.* by cancelling the sum of 13*s.* 4*d.* upon each share. Each of the shares of the society which have been issued and are not fully paid shall likewise be reduced to the nominal value of 6*s.* 8*d.*, but so that the existing liability in respect of unpaid capital on such shares respectively shall not be extinguished or reduced.'"

On March 25, 1922, rule 12, as amended on November 14, 1921, was further amended by substituting for the words "five shares" in the two places in which they occurred the words "shares of the nominal value of 5*l.*"

On January 30, 1923, the society went into voluntary liquidation. The liquidator took out a summons, in which five representative members, each of whom joined the society before March 25, 1922, were made respondents, for the determination of the question whether, having regard to the rules and the amendments thereto, the respondents, or some of them, and which of them, should be placed on the list of contributories.

Romer J. held that, having regard to the fact that *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), was overruled in terms by the Court of Appeal in *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society* (2), and to the speeches in the House of Lords in the latter case (see *Biddulph*

(1) [1923] 1 Ch. 342. (2) [1925] Ch. 769.

and District Agricultural Society v. *Agricultural Wholesale Society* (1)), he was bound to hold that the alterations made in rule 12 in the present case were binding on the respondents. With regard to the amendment to rule 23, he could not assent to the contention that a member to whom the rule applied ceased to be a member whether the committee did or did not repay the amount paid up on his shares and cancel them. If the committee decided that they should not be cancelled, it could not have been intended that the member should nevertheless cease to be a member. The more natural construction was to treat the words at the end of the rule as meaning "and shall in that case cease to be a member." The final contention of the respondents that rule 12 and its amendments were void for uncertainty could not be maintained. He accordingly held that the respondents must be placed on the list of contributories in respect of the number of shares shown opposite their respective names in the schedule to the summons.

Four of the five respondents—namely, the Marquis of Bath, Frederick Martin, Hayward Hole and George Rich—appealed. Separate notices of appeal were given, one by the first two respondents and another by the second two. The two appeals were heard together on December 4, 1928.

Vaisey K.C. and *H. S. G. Buckmaster* for the appellants in both appeals, repeated in substance the arguments used by them in the Court below.

Wilfrid Greene K.C., *Rowland Thomas* and *Renfield* for the liquidator were not called upon to argue.

LORD HANWORTH M.R. These appeals must be dismissed. The learned judge in the Court below went very carefully into the case and into the decisions of this Court and of the House of Lords in *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society* (2), and having given very careful attention to those decisions, he held that rule 12

(1) [1927] A. C. 76. (2) [1925] Ch. 769; [1927] A. C. 76.

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and the alterations to it were binding on the appellants in the present case. I agree with the learned judge. In my opinion those two decisions govern the present case. I think it is absolutely clear that the decision of the Court of Appeal was given upon the point now raised—namely, whether the rule as altered was binding upon the contributories apart from the contract between them and the society, and that the Court decided that it was. Upon appeal to the House of Lords the decision of this Court was affirmed, and, apart perhaps from Lord Sumner, I think that all their Lordships intended to affirm and did affirm, the judgments of the Court of Appeal upon this point, and to support the reasoning upon which those judgments were founded. To my mind, therefore, we are bound both by our previous decision in *Biddulph's* case (1) and by the decision of the House of Lords (2) to hold as Romer J. has held. I do not desire to add anything to my judgment in *Biddulph's* case. (1) It seems to me that I ought to say nothing more, because if I did it might be said that I had added to or detracted from my judgment in that case ; a judgment which I think was approved by the speeches of the members of the House of Lords.

For these reasons I do not add any more except upon the minor point taken—namely, whether or not the new rule 12 is bad for uncertainty. I think Romer J. took the right view upon that point also. I feel myself that there need be no uncertainty as to the meaning of the rule on the part of persons accustomed to deal with such problems. To my mind the rule can be interpreted by those concerned with reasonable working certainty and therefore there is no uncertainty to make it bad. These rules are for persons dealing with agricultural questions, and persons using them will I think be able to administer them. The appeals must be dismissed with costs.

LAWRENCE L.J. I agree. In my opinion the main point taken by Mr. Vaisey is completely covered by the decision of this Court in *Biddulph's* case. (1) Upon the minor point

(1) [1925] Ch. 769. (2) [1927] A. C. 76.

taken by him I agree with Romer J. and the Master of the Rolls that there is no uncertainty in the rule.

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RUSSELL L.J. I agree.

Appeals dismissed.

Solicitors for appellants: *Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett.*

Solicitors for respondent: *Stephenson, Harwood & Tatham.*

W. I. C.

In re NORTHCLIFFE. ARNHOLZ *v.* HUDSON.

MAUGHAM J. 1928 *Nov.* 6, 7, 8.

Death Duties—Will bequeathing Shares of Income of Residue to Persons for Life with accruer Clause and subject thereto the Corpus to Charities—Estate Duty payable on Death of any such Person, how to be calculated and out of what Fund to be paid—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-ss.* 1, 6.

The late Viscount Northcliffe by his will and three codicils thereto disposed by clause 6 of his will of 74¼ hundredths of the income of his residuary estate. By sub-clause 28 he provided that on the death of any of the legatees his or her share should accrue to the survivors. By sub-clause 29 he provided for the remaining income in payment of other legacies, and these being paid the remainder was to be applied in the same manner as the 74¼ hundredths. By clause 10 it was directed that the capital should go in moieties to charities. By an order made on July 28, 1924, the income was divided into one hundred and thirds. Two of the income beneficiaries had now died.

On a summons taken out in these circumstances asking whether the estate duty payable by reason of the death of any person entitled to any share of the income was to be paid upon the value of the share in the capital equal to that of the income previously enjoyed by such person or upon the like proportion of the actuarial capital value of the income during the respective lives of the several persons entitled thereto or other the period during which the trusts in respect of such income should be subsisting or how otherwise the same ought to be calculated and out of what fund the same was payable:—

Held, (1.) that the property which passed on the death of any such person must be taken to be a share of capital in the residuary trust fund, and that estate duty must be paid on the value of such share. And (2.) that the duty payable on any such death was a first charge on that portion of the residue out of which the income was payable, and must be borne by the corpus of such estate.

In re Cassel [1927] 2 Ch. 275 distinguished.

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THE question asked by this summons was (among others) whether the estate duty payable by reason of the death of any person entitled to any share of income in the residuary estate of the testator ought to be paid upon the value of the share in the capital of such estate equal to the share of income of such estate previously enjoyed by such deceased beneficiary or upon the like proportion of the actuarial capital value of the income of the said estate during the respective lives of the several persons entitled thereto or other the period during which the trusts in respect of such income under the said will shall be subsisting or how otherwise the same ought to be calculated and out of what fund the same is payable.

The late Lord Northcliffe made a will and three codicils, all of which were admitted to probate.

By clause 6 of the will after certain specific devises and bequests and one pecuniary legacy he disposed of the residue of his estate upon trust for sale and investment, and directed that his trustees should stand possessed of his resulting residuary trust fund to pay the net income arising therefrom in each year in shares (expressed to be one-hundredths) to certain persons therein mentioned. Sub-clause 28 contained a proviso that upon the failure of the trusts declared with respect to any of the said shares of income "the shares or share of income which are or is the subject of the trust which shall have failed (including all additions thereto under this present provision) shall be added to the income of such of the said trusts as shall not have failed at that date, and to the last one of such trusts when all but one shall have failed and in every case except the last such addition to each trust shall be in the proportion which the income then subject to that trust (including income accrued under this present provision) shall at that date bear to the income then subject to others or other of the said trusts which shall not have failed (including income accrued under this present provision)." He then directed out of a fund to be created out of the accumulations of a number of the said one-hundredth shares payment of a large number of legacies (which had been

paid) and some annuities. Subject thereto the residuary trust fund was to be held by clause 10 upon trust for charities.

The testator having by his said will and codicils thereto purported to dispose of more than 100 shares of income, it was by orders made July 28, 1924, directed that such shares should be treated as one hundred and thirds, and that after provision of a legacy fund in manner therein appearing, the rest of the estate should be treated as representing the $74\frac{1}{4}$ shares of the residuary trust fund payable or applicable in manner directed by clause 6 of his said will.

Two of such income beneficiaries had died—namely, Mrs. Ann Milner, on January 18, 1923, and Mrs. Geraldine Mary Harmsworth, on August 29, 1925.

In these circumstances this summons was taken out.

Evershed (*Arnholz* with him) for the plaintiff stated the facts.

Stamp for the Inland Revenue Commissioners. This is quite a simple ordinary case of settled property under ss. 1 or 2 of the Finance Act. One-ninth passed on the death of Mrs. Harmsworth, and under s. 7 duty has to be paid on the principal value of that ninth. There is an alternative way of calculating it under s. 7, sub-s. 7, but it comes to the same thing.

[MAUGHAM J. That leads to a curious result, because some part of the shares of income will pass 28 times. Will not nearly all the estate go to the Crown ?]

Stamp. It is the same with a number of successive life estates.

[He referred to the Finance Act, 1914, and the definition clause in the Act of 1894, s. 22, sub-s. 8, as to settled property.]

Greene K.C. and *A. L. Ellis* for Sir George Sutton, an executor. Stamp's proposition does not exhaust the possibility. What does pass here by the language of the will is income as a separate article of property quite distinct from the capital from which it arises. It is a sort of tontine

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trust. The capital representing it did not pass at all: *In re Palmer.* (1) That was previous to *In re Cassel.* (2)

[MAUGHAM J. Suppose there were no accruer clause?]

That would be a case under s. 2, sub-s. 1 (*b*).

[He referred to Hanson on Death Duties, 7th ed., p. 62, as to property passing.]

Potts (*Sir T. Hughes K.C.* with him) for the charities. All that passed here on the death of Mrs. Harmsworth was the right to receive a certain portion of the income. There was no cesser of the interest during the tontine. If there had been no accruer clause it might be correct to say that shares in the corpus passed. Here it did not pass at all. *In re Cassel* (2) applies.

Crossman (with him *Sir Thomas Inskip K.C.*, *A.-G.*) for the Attorney-General as representing charities adopted these arguments.

Whittaker; Wilfred Hunt; Bennett K.C. and *L. Cohen; Archer K.C.* and *R. Peel* for other parties.

MAUGHAM J. The question which now arises for decision is whether the estate duty payable by reason of the death of any person entitled to any share of the income of the residuary estate ought to be paid on the value of a share in the capital of the residuary estate of the testator equal to the share of the income of such residuary estate previously enjoyed by the deceased beneficiary or on some other basis. The question is one which is immediately ripe for decision by reason of the fact that two of the income beneficiaries have died—namely, Mrs. Ann Milner, who died on January 18, 1923, and Mrs. Geraldine Mary Harmsworth, who died on August 29, 1925. It is to be borne in mind that the interests of these two beneficiaries are derived under s. 6 of the will of the testator, which is prefaced by the statement that the trustees, out of the proceeds of conversion of his real and personal estate and after making certain payments, "shall stand possessed of such residuary moneys and the investments for the time being representing the same (hereinafter called

(1) [1916] 2 Ch. 391. (2) [1927] 2 Ch. 275.

'the residuary trust fund') . . . . upon trust to pay the net income arising therefrom in each year in the shares and manner following." These interests were somewhat altered by the effect of the codicil and the order construing the codicil, which I need not deal with for the moment. The interest payable to Mrs. Milner is in sub-para. 9. It was originally a gift "as to one equal one-hundredth part of the said income to my wife's mother for her life." Under clause 10 of the will there is the gift of the residue upon charitable trusts after the trusts of income theretofore declared shall have come to an end.

The point arises by reason of the fact that in sub-clause 28 of the will there is an accruer clause, which is in these terms: [His Lordship read it.] It is apparent that the trust relating to income will go on for a very long period. In the meantime the shares of the various persons who die having been entitled to proportions of the income of the residuary trust fund go to augment the shares of the survivor, so that the last survivor becomes entitled to the whole of the income of the residue, and upon his or her death the property goes to the charity. There is a slight complication introduced by the circumstances that certain shares are payable under sub-clauses 23, 24 and 25 to certain trustees of settlements therein mentioned, but for the present purpose I need not go into that matter at all. Prima facie it seems to me that these interests in various one-hundredths or some other proportions of the income of the residuary trust fund are in substance in precisely the same position from the point of view of estate duty as are the interests of persons who are entitled to aliquot shares of residue for life. I am unable to understand why if a testator chooses to divide the income of his residue among, we will say, three children instead of giving it all to one person, any difference arises in relation to the question of the section under which the estate duty is leviable. If real or personal property is given to A. for life and then to B.—it matters not for this purpose whether the property is real or personal estate—upon the death of A. it is not disputed that s. 1 of the Finance

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Act, 1894, applies, and estate duty is leviable upon the principal value of that property. If it happens to be settled property which passes upon the death of the tenant for life, " passing " there is obviously used in the sense of passing in possession. If instead of the simple case I have given the property goes in aliquot shares between A., B. and C. for life and then to D., I cannot see why the same result does not follow. It seems to me that in such a case, upon the death of one of the three life tenants the property which passes on his death is the proportion of the estate of the testator which passes in the sense of passing in possession to the person next entitled. If in such a case there were an accruer clause, still I think precisely the same result would follow, except that unfortunately for the ultimate beneficiaries in such a case the Crown would benefit because the property would pass more than once in the event of A. dying leaving B. and C. the other life tenants surviving him, and then we will say B. dying and leaving C. in possession. In such a case one-third of the property would pass on the death of the first life tenant, and then one-half on the death of the second life tenant, and then on the death of the third life tenant the whole would pass to the remainderman. And though in this case I have every inclination to see if I can escape from the claim of the Crown, I am unable to see how on any fair interpretation of the words of the will I can come to the conclusion that the testator has dealt with the income of the residuary trust fund in such a way as to make it, as has been said, a separate item of property in such a way as that the estate duty upon the death of the life tenant falls to be determined on a different basis from that which would be applied upon the death in such a case as I have mentioned of a tenant for life of an aliquot share of a residue. It is said that what is in effect done is to dispose of the income of his residuary estate for a period which has been called, not inappropriately, a tontine period; and, accordingly, having separated up that item of property and the rest of his estate, what we have to consider as passing from time to time of the death of any of these beneficiaries of one-hundredth

parts is the property subject to the tontine period and coming to an end at the expiration of that period. I do not think that that is a legitimate conclusion to be drawn from the language of the testator. He has divided the income of the residuary trust fund into certain shares, and has given people aliquot portions of those shares. The case of *In re Cassel* (1) has been referred to as supporting the view of those who resist the claim of the Crown. It was, however, a very exceptional case where the testator bequeathed Brook House and contents and certain other property, which I need not mention at the moment, to trustees upon trust to allow a certain beneficiary to have the use and enjoyment thereof for her life and after her death upon similar life trusts for other persons. A number of points were argued before Russell J., who decided (after a doubt which was removed by a consideration of a decision of the House of Lords in the case of *Earl Cowley* v. *Inland Revenue Commissioners* (2)), that the case was one where property passed under s. 1 of the Finance Act of 1894. He then had to consider the question what property passed on Mrs. Cassel's death, and he answered the question by saying that it was the benefit of the annual sum payable under the special clause. It is to be observed there that the sum payable from time to time by the trustees out of the income was a sum which could not possibly be ascertained at the death of the testator, and varied with the quantum of rates and taxes payable from time to time, and of the outgoings necessary for keeping the premises and contents, which were of very great value, in a proper state of preservation an amount which was equally uncertain. It was therefore almost impossible to say that the principal value of the property out of which that sum had to be paid passed on the death of the first tenant for life. Accordingly, quite naturally as I think, he came to the conclusion that the case was of a very special character, and there being no section of the Act of 1894 which really exactly applied, it had to be met by holding that what passed was the benefit of the

(1) [1927] 2 Ch. 275. (2) [1899] A. C. 198.

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annual sum which was payable under the special clause. It is said that I can apply the principle of that case here. I have no power to do anything of the sort. I think the property which passed is to be taken to be a share of capital in the residuary trust fund. Accordingly estate duty must be paid on the value of such a share. That is as between the estate and the Crown. Now as between the estate and the beneficiaries.

The second question was out of what fund was the duty payable.

Bennett K.C. and *L. Cohen* for Lady Hudson. Estate duty payable on Mrs. Harmsworth's death was a first charge on the property.

[*Stamp* referred to s. 9 of the Act of 1894.]

[MAUGHAM J. referred to *Berry* v. *Gaukroger*. (1)]

Potts submitted that *In re Cassel* (2) applied. It is payable out of residue, and then to be recouped by the persons benefited by a policy of assurance.

[As to the words, "free of all duties," he referred to *In re Wedgwood* (3); *In re Sarson* (4); and *In re Jones*. (5)]

Crossman was in the same interest. Having regard to his Lordship's decision on the first question he could not now call *In re Cassel* (2) in aid.

MAUGHAM J. The question now arises out of what fund estate duty is payable by reason of the death of Mrs. Ann Milner or Mrs. Harmsworth. I have come to the conclusion that this is a case where the language of s. 9 of the Finance Act, 1894, applies, and that that part of the duty on the interest of the deceased which does not pass to the executors of either of these ladies (as these interests do not since they terminated with their lives), must be, in the language of s. 9, sub-s. 1, a first charge on the property in respect of which duty is payable. I have already held, being compelled to

(1) [1903] 2 Ch. 116.
(2) [1927] 2 Ch. 275.
(3) [1921] 1 Ch. 601.
(4) [1925] Ch. 31.
(5) [1928] W. N. 227.

hold, that the property which passed within the meaning of the Finance Act, 1894, by reason of the deaths of these ladies, was not an isolated property separated in some way from the rest of the estate of the testator, but a share or slice of residue from which the income payable to each of these ladies was derived. I am therefore bound, I think, to hold that the estate duty payable on each of these deaths is a first charge on that portion of the residue out of which the income was payable. Sect. 9, sub-s. 6, shows quite clearly the intention of the Legislature, that the person who inherits a limited interest in property on which duty has to be paid and who pays the duty in respect of that property, is to be entitled to a charge on the property as if the estate duty on that property had been raised by means of a mortgage to him. It has been held in the House of Lords that this automatically gives a charge to the tenant for life or person who pays the duty. Accordingly I think it is impossible to hold consistently with what I said on the first part of the question, that the duty we are now dealing with can be thrown either by means of a policy, on which the new tenant for life would bear the premiums, or in any other way on the persons who acquire limited interests in the shares of income which accrue to them on the death of each legatee. The result is that the duty in question must, I think, be borne out of the corpus of the estate.

Solicitors : *Russell & Arnholz ; Ellis, Peirs & Co. ; Hurford & Taylor ; Charles Russell & Co. ; Nicholson, Graham & Jones ; Taylor, Willcocks & Co.*

Solicitor to Inland Revenue : *Treasury Solicitor.*

A. W. C.

MAUGHAM J.
1928
Nov. 28.

In re BARRAT.
BODY *v.* BARRAT.

[1928. B. 4064.]

Law of Property Act—Transitional Provisions—Gift of Property by Will as to Income to Wife for Life, then to Children in certain Shares, and as to Corpus to the last Survivor—Vesting—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part. IV.*, 1 (1.)—*Para.* 4 *added by Act of* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *inapplicable—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 31.

The testator, who died on June 16, 1881, leaving a widow and eight children, by his will gave all his estate to his wife and four children, whom he appointed executors and trustees, upon trust to pay his debts, etc., and bequeathed the remainder of his personal effects to his wife and the income of his freeholds and leaseholds, subject to certain payments, and after her decease to pay such income to his four sons and daughters in certain shares, which were to cease at death, with a proviso as to four quarterly payments to widows of sons, and, subject thereto, gave his estate to the longest liver of his children absolutely. The widow died in 1900, and on the coming into force of the Law of Property Act, 1925, the defendant and daughter, who had since died, were the surviving trustees. All parties interested in the estate now desired a sale, and the question raised by this summons was first, whether the plaintiff and the defendant Reuben, the surviving trustee, were together tenant for life for the purposes of the Settled Land Act. Secondly, if it be not settled land, whether the entirety was now vested in the surviving trustee or in the Public Trustee on the statutory trusts:—

Held, that Sch. I., Part IV., para. 4, of the Law of Property Act, 1925, added by the amending Act of 1926, was not applicable to the case; and, secondly, having regard to s. 31 of the Wills Act, 1837, and following the decision of Clauson J. in *In re Dawson's Settled Estates* [1928] Ch. 421, that the entirety was now vested in the surviving trustee under para. 1, sub-para. (1.), upon the statutory trusts.

THE above named testator by his last will gave all his estate to his wife and four of his children (naming them) whom he appointed trustees and executors thereof upon trust to pay his debts and funeral and testamentary expenses out of cash or money in the funds and the remainder he bequeathed for the use and benefit of his said wife and also the income or rents of his freeholds and leaseholds, subject to certain payments, and "after her decease to pay the said income to my four sons and four daughters (naming them) 60*l.* to each of my unmarried daughters and

the residue to be shared equally between the rest of my children living at the time of the division. If the unmarried daughters take more than 15*l.* quarterly then they are to share equally with the others. Such payments to be free of the debts of any husband. On the death of a child his or her interest will cease, but I direct the trustees to continue four payments quarterly to the widows of sons. I give all my freehold and leasehold or other property absolutely to the longest survivor of my children for his or her sole use and benefit."

The testator died on June 16, 1881, leaving the widow and eight children him surviving. The widow died in 1900, and on the coming into force of the Law of Property Act, 1925, the defendant Reuben Barrat and a daughter Hephzibah, who had since died, were the surviving trustees. All parties desiring a sale this summons was taken out asking first, whether the property was vested in the plaintiff Priscilla Body, a daughter, and the defendant Reuben Barrat, together tenant for life under the Settled Land Act, 1925, or secondly, if it be not settled land, whether the entirety was now vested in Reuben as the surviving trustee or in the Public Trustee.

W. A. Jolly for the summons. The first question is whether a good title can be made having regard to the new Acts and to the persons having an interest in the property. The question arises under the new paragraph of the amending Act of 1926 to Sch. I., Part IV., of the Law of Property Act, 1925. In the Schedule to the Act of 1926 are to be found these words: "At the end of para. 3 (of Sch. I., Part IV., of the Act of 1925) the following new paragraph shall be inserted: 4. Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and, after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interest shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them

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shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act."

His submission was that the present case fell within that paragraph. If not, one must go back to para. 1 of Sch. I., Part IV., and the sub-paragraphs. If this para. 4 applied there must be a vesting deed before a title can be made—otherwise no such deed is necessary.

P. M. Walters for the defendant. The new paragraph does not apply. If Reuben survives the plaintiff his life interest continues, as his widow, assuming that she survives him, gets four instalments quarterly. Therefore the cesser of his life interest is not the determining factor. The new clause contemplates that the last survivor is tenant for life.

Jolly referred to *In re Colyer's Farningham Estate* (1) and *In re Higgs and May's Contract.* (2)

MAUGHAM J. The question which arises here is as to the true construction of the Schedule to the Law of Property Amendment Act, 1926, in so far as it provides by way of amendment of the Law of Property Act, 1925, that at the end of para. 3 of Sch. I., Part IV., the following new paragraph shall be inserted. [His Lordship read it.] In the present case the will of the testator contains some curious provisions. He died on June 16, 1881, leaving a widow him surviving and eight children, and he gave by his will all his estate to his wife and four children, whom he appointed executors and trustees upon trust to pay his debts and funeral and testamentary expenses, and then he bequeathed the remainder of his personal effects to his wife for her own use and benefit, and also all the income from rents of all his freehold and leasehold property after deducting ground rent, etc., and subject to certain payments to the children. After her decease there is a trust to pay the net income to the four sons and daughters or such as should be living at the time of division and equally if more than one. On the death of any one of his children his or her share in the income

(1) [1927] 1 Ch. 677. (2) [1927] 2 Ch. 249.

was to cease, except that in the case of sons leaving widows they were to receive four quarterly payments as they became due and no more. Then he gave and bequeathed all the rest of his freehold and leasehold property to the longest survivor of his children for his or her sole use and benefit. He left eight children. The widow died in 1900 and some of the children died, and immediately before the Law of Property Act, 1925, came into force the defendant Reuben and the daughter Hephzibah and the plaintiff Priscilla Body were the only three surviving. Reuben had married, and his wife is a defendant. Hephzibah died in 1928. There were some leasehold and two freehold houses. All parties desire a sale, and the question is whether these people together constitute a tenant for life for the purposes of the Settled Land Act or whether the property is held by the trustees of the will on the statutory trusts created by the Law of Property Act, 1925. This question turns on whether the paragraph added by the amending provision of the Act of 1926 applies to the present case. It is clear that immediately before the commencement of the Act of 1925 there were two or more tenants for life of full age entitled under the same settlement in certain shares. There is no difficulty as to that. What causes the difficulty is that the last survivor will become absolutely entitled to the property. Any question as to the payments to widows may be excluded for a moment. Now, as Eve J. pointed out in *In re Higgs and May's Contract* (1), there is nothing in the amending Act which repeals the provisions of paras. 1 to 3 of Sch. I., Part IV. No construction ought readily to be imposed on it which has such an effect unless the words are clear. I have therefore to follow closely the wording of para. 4 in order to determine whether the case comes within it or not. Under para. 4 where it applies the interests of two or more tenants for life of full age shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them until the cesser of all the interests shall constitute together the tenant

(1) [1927] 2 Ch. 249.

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for life under the Acts, so that the survivor, for instance, of three tenants for life entitled to shares is a person contemplated as tenant for life for the purposes of the Settled Land and Law of Property Acts. That is consistent with the view that their interests in the income must cease. In my opinion the words of the paragraph apply only where the entirety of the land is limited so as to devolve on some person other than one of the tenants for life originally or previously entitled. I think therefore the present case is not within the provisions of para. 4. Perhaps I ought to add that weight ought to be given to the argument in this particular case that the survivor is entitled to the entirety, but subject to the provision that the trustees have to pay four quarterly shares of income to a widow. That, however, is not the ground of my decision. It rests upon the view that the new paragraph does not apply to a case where the survivor of tenants entitled in shares is a person absolutely entitled to the property.

Jolly. The second question is, if it be not settled land whether the entirety is now vested in Reuben, the surviving trustee, by virtue of para. 1, sub-para. (1.), of the Law of Property Act, 1925, Sch. I., Part IV., or in the Public Trustee under sub-para. (4.). Unfortunately there are conflicting decisions: *In re Catchpool*, before Russell J. (1); and *In re Dawson's Settled Estates*, before Clauson J. (2) The first decision on the point was *In re Flint.* (3)

[He also cited *In re Higgs and May's Contract.* (4)]

Walters referred to *In re Myhill.* (5)

MAUGHAM J. referred to s. 31 of the Wills Act. That clause apparently applies here. The trust is to continue beyond the son's life to pay to a widow the four quarterly instalments.

Jolly. Then your Lordship decides that as to question two that the case is within para. 1, sub-para. (1.)

(1) [1928] Ch. 429.
(2) Ibid. 421.
(3) [1927] 1 Ch. 570.
(4) [1927] 2 Ch. 249.
(5) [1928] Ch. 100.

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MAUGHAM J. Yes. I should add that in my view it is very desirable that the same construction should be adopted by different judges on these difficult questions which arise on the Law of Property Act, 1925, and the amending Act. Inasmuch as my brother Clauson J. after full argument has distinctly determined the point in *In re Dawson's Settled Estates* (1) I think it right to follow his decision.

Solicitors: *Turner, Osborn & Chatterton, for Young, Coles & Langdon, Hastings.*

A. W. C.

MAUGHAM J. 1928 Dec. 7.

In re KNAPP. SPRECKLEY *v.* ATTORNEY-GENERAL.

[1928. K. 462.]

Will—Gift for Benefit of Charity—Direction to accumulate Income—Directory Provision—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 166.

The expression in a will of a wish that "the interest upon my investments may be allowed to accumulate . . . ." followed by an indication of the charitable objects to which the accumulations are to be devoted does not bind the trustees of the will. But it is a directory provision; and the trustees ought to bear it in mind and generally to use their discretion so as to give effect to it.

A will, after certain bequests, including a bequest of residue in trust for "the Trustees of the S. M. Charities," expressed a wish of the testator that "the income upon my investments may be allowed to accumulate for a period of twenty-one years or so long as the law will allow," and then set out various charitable objects in the town of S. which the testator desired should thereafter benefit by such income only. Upon a summons for the decision of the question (inter alia) whether the direction to accumulate was valid:—

Held, (1.) that the directions as to the application of income for various charitable objects in the town of S. constituted a binding trust; (2.) that the wish as to accumulation was not binding, but was in the circumstances a directory provision, to which regard should be had in settling a scheme.

Harbin v. *Masterman* (1871) L. R. 12 Eq. 559 and *Wharton* v. *Masterman* [1895] A. C. 186 applied.

ADJOURNED SUMMONS.

By his will dated December 20, 1921, John Knapp (hereinafter called "the testator") appointed Kate Spreckley his

(1) [1928] Ch. 421.

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executrix, and, after bequests of annuities and of personal chattels, provided as follows: "Subject to the above charges, I bequeath everything that I may have (in trust) for the trustees of the Scarborough Municipal Charities (after payment of all my just debts and other expenses) and my wish is that the interest on my investments may be allowed to accumulate for a period of 21 years or so long as the law will allow, and from that time the interest only from my investments be applied for the purchase of land and the building thereon of almshouses for the aged poor of Scarborough, and to the payment of the rates upon the same and the keeping of the buildings in a good state of repair. My wish is that the total amount of money including the accumulated interest at the end of the 21 years should remain intact for all time." Two codicils, dated respectively May 16, 1923, and May 6, 1924, confirmed these provisions. The testator died on April 18, 1927, the will and codicils being proved by the said executrix on June 4, 1927. This summons, taken out on behalf of the executrix, asked (inter alia) whether the direction to accumulate income for a period of 21 years "or so long as the law will allow" was valid; if not, whether such income belonged for any period to the trustees of the Scarborough Municipal Charities, or passed under an intestacy, and whether the direction in the will to apply the income from the testator's investments "for the purchase of land and the building thereon of almshouses for the aged poor of Scarborough, and to the payment of the rates upon the same and the keeping of the buildings in a good state of repair," was a valid direction and binding upon the said trustees; or whether the said interest and income was applicable for the general purposes of the said charities.

A. J. Belsham for the summons.

W. F. Swords for a respondent on behalf of the Scarborough Municipal Charities. It is made quite clear, by the words used, that a trust is here imposed. There is evidence of the existence of interests which show that there is a binding trust.

Roger Turnbull for one of the next of kin. The residue is undisposed of by the will. The testator has given it to the trustees, but has declared no trusts of it. The words which follow the gift are entirely particular. He has not given it to trustees of a charity for general purposes. He has vested it, subject to overriding charges, in the trustees of his will; and he then proceeds to indicate what he wishes them to do. The true principle is that, where a testator gives property to trustees and declares no trusts, the next of kin must take, as the property is undisposed of: *Morice* v. *Bishop of Durham* (1); *Aston* v. *Wood* (2); *In re Freeman.* (3) It is quite clear that the property is undisposed of. There has never been a case in which it was held that the use of the word "wish" indicated an imperative trust. A similar point arose in *In re Davidson.* (4) The testator has by his will constituted these persons trustees of his residuary estate, and he intended to give these funds for the purposes indicated—first of all for accumulation and then for gifts of income. The estate is undisposed of and passes to the next of kin.

Stafford Crossman for the Attorney-General. There is here a mere expression of a wish. But the word "wish" is here quite strong enough to create a binding trust: *Wharton* v. *Masterman.* (5) In the present case, there is an immediate gift for the charity, and it would be a breach of trust on the part of the trustees to disregard the provision as to accumulation, that being one of the trusts. They will take the money and hold it upon trust to accumulate. In a case of this kind it might be thought proper, under a scheme, to put an end to accumulations.

[MAUGHAM J. I think it might be reasonable to give effect to the express wishes of the testator so far as they are legal. But I do not think that it can be put higher than that.]

But accumulation is one of the conditions which the testator has laid down for carrying his charitable intentions into effect: *In re Swain.* (6) In that case the Court of

(1) (1805) 10 Ves. 526, 534.
(2) (1868) L. R. 6 Eq. 419.
(3) [1908] 1 Ch. 720.
(4) [1909] 1 Ch. 567.
(5) [1895] A. C. 186.
(6) [1905] 1 Ch. 669.

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Appeal did not seem to have any idea that the direction was ineffectual, although it was a direction to accumulate.

MAUGHAM J. [after holding that, on the true construction of the testator's will, there was a binding charitable trust:] The next question is as to the direction to accumulate. A similar question was considered in *Harbin* v. *Masterman*. (1) That case dealt with a direction to accumulate, the residuary legatees (who were to benefit by the accumulations and to take the whole of the personalty at the end of the period of accumulation) being charities. It was held that the ordinary rule applied, but that the residuary legatees, being charities, were not entitled to have the accumulations stopped and to take the money at once, and it was therefore held that the accumulations should continue until further order. But in *Wharton* v. *Masterman* (2) the House of Lords overruled Wickens V.-C. on that point, Lord Macnaghten saying that he was "unable to see any substantial distinction between the case of . . . . a charity and an individual."

The result of that authority is that the trustees in the present case, who are bound by the trust, are not strictly bound by the direction to accumulate. That direction is a directory provision of a kind which trustees of charities ought prima facie to bear in mind and to carry out in the performance of their trusts; but it is no more than that. The testator, however, has shown that he desires the fund to be such that income shall be available for buying land and building houses, and it will therefore be desirable to accumulate until the income is large enough for the scheme to be carried out. There will be a reference in Chambers to settle the scheme.

I desire to add in conclusion that under s. 166 of the Law of Property Act, 1925 (replacing s. 1 of the Accumulations Act, 1892), accumulations of which the only object is the purchase of land are prohibited. But that is not the present case, and therefore the section does not apply.

Solicitors: *Radford & Frankland, for Birdsall & Snowball, Scarborough; Treasury Solicitor.*

(1) L. R. 12 Eq. 559. (2) [1895] A. C. 186, 195.

K. R. A. H.

In re LORD SHERBORNE'S SETTLED ESTATE.

TOMLIN J.

1928

July 6, 9.

[1928. S. 237.]

Settled Land—Tenant for Life—Dilapidations to settled Property—Cost of Repairs to Buildings—Electric Light Installation in Mansion House—Expenditure by Tenant for Life—Claim for Recoupment—Capital Expenditure—"Authorised improvements"—Installation and Improvements effected prior to January 1, 1926—*Improvements not authorized, under Settled Land Acts,* 1882 *to* 1890—*Claim for Recoupment for increased Value of settled Property sold—Tenant Right Valuation—Rebate—Repayment by Instalments—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 83, 84, 85, 87 *and* 88, *Third Schedule, Part III.*

A tenant for life of certain settled estates had expended on the settled property large sums of money for improvements, repairs and other works. Among the items of expenditure so incurred were certain electric light installations to the mansion house and the erection of batteries. These particular works had been carried out before the coming into force of the Settled Land Act, 1925, and were therefore not "authorised improvements" under the Settled Land Acts, 1882 to 1890, for which the Court could have granted repayment to the tenant for life out of capital, although under the new Act of 1925, they would be "authorised improvements."

On an application by the tenant for life to be recouped out of capital these sums so expended by him:—

Held, that notwithstanding the fact that these works were executed prior to the Settled Land Act, 1925, there was under the new Act, jurisdiction in the Court, if it thought fit, to order repayment of these sums to the tenant for life out of capital moneys; and consequently, as these particular items were "authorised improvements" under the Settled Land Act, 1925, they could be repayable out of capital, notwithstanding the fact that they were incurred on works executed before January 1, 1926. Having regard, however, to the fact that certain of the works had been carried out several years previously, there would have to be a rebate to allow for a diminished value:—

The tenant for life having further claimed that he should be repaid a proportion of the proceeds of sale of a part of the settled land, for tenant right valuation, on the ground that by his careful management before the sale he had enhanced its value:—

Held, that such a claim was really one to be repaid out of capital moneys, for an improvement not within the Settled Land Acts, and the Court had no jurisdiction to allow it.

ORIGINATING SUMMONS.

This was an application by the tenant for life of certain settled estates, to be recouped out of capital moneys expenditure for improvements and repairs executed by him from

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time to time to the principal mansion house, farms, lands and buildings, the subject of the settlement; and further, that the trustees might be directed to repay him the sum of 1000*l.* out of the proceeds of sale of a farm, part of the settled lands, such sum being, as he alleged, the portion properly attributable to the tenant right valuation for improvements effected by him before the sale.

By his will dated July 24, 1906, Edward Lenox, 4th Baron Sherborne (hereinafter called " the testator "), after appointing Sir Cecil Lister Kaye, Bart., Robert M. Howard and William Anstruther Gray (hereinafter called " the trustees "), trustees thereof and also trustees for all the purposes of the Settled Land Acts, 1882 to 1890, devised his estates at Sherborne, Bibury and Standish in the county of Gloucester, and all other his lands, manors and hereditaments whatsoever and wheresoever situate of freehold tenure, to the use of his brother Frederick George Dutton, (afterwards 5th Baron Sherborne) for life, with remainder to the use of another brother, Charles Dutton, (who predeceased the testator) for life, with remainder to the use of his nephew, the applicant, James Huntley Dutton, (eldest son of the said Charles Dutton), 6th Baron Sherborne (hereinafter called the " tenant for life "), for his life with divers remainders over. And the testator thereby directed that every tenant for life within the meaning of the Settled Land Acts of real estate devised by that his will, should be impeachable for waste. The testator died on July 19, 1919, and his brother, the 5th Baron Sherborne, on January 2, 1920, whereupon the tenant for life became tenant for life in possession of all the estates settled by the will of the testator.

At the date of the succession of the tenant for life to the settled estates, it was found that owing to the European war and the consequent excessive cost of materials, shortage of labour, etc., the buildings, walls, fences, farms and lands forming the said settled estates were in a very bad state of repair and condition, all improvements and necessary repairs having had to be suspended. A considerable expenditure was therefore necessary to put them in proper condition,

and many permanent improvements were urgently required. In consequence between January, 1920, and December, 1924, sums amounting to over 31,000*l.* were expended by the tenant for life in necessary repairs and improvements to the settled lands and buildings, a large portion of which was alleged to be for improvements of a permanent nature and calculated to increase the capital value of the estate. Before executing such improvements, it appeared that no scheme was submitted to the trustees or the Court for approval, as it was considered that there were sufficient funds standing to the credit of the estate account which could be applied in payment for the said improvements. The matter, however, came before the Court subsequently, for the recoupment to the tenant for life for various items of expenditure so incurred by him on the settled estates, and orders were made from time to time with respect to such recoupment. Since 1924 further sums, amounting in the aggregate to some 16,000*l.*, were expended by the tenant for life on various repairs and improvements, and which he contended were improvements for which capital moneys could be properly applied. In an index or summary exhibited to an affidavit dated April 27, 1928, of one Robert Gray, the agent of the tenant for life, there was shown detailed items of certain of the sums expended by the tenant for life, with dates, amounts, etc., and which were alleged to constitute permanent improvements calculated to increase the capital value of the estates. Of such items some were incurred for work carried out prior to January 1, 1926, and were not authorized improvements under the Settled Land Acts, 1882 to 1890. It was further contended that the electrical work set out in the summary amounted to a complete new electric installation for Sherborne House, and was essential to be carried out owing to the dangerous condition of the old installation. The items of expenditure so set out and incurred by the tenant for life, and for which he claimed recoupment out of capital moneys, were, for the purposes of report (inter alia), as follows :—

No. 70. "New hot water and heating apparatus." Sherborne House, stables, etc. February 8, 1926. Supplying,

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etc. . . . . E. furnaces for Sherborne House central heating. 97*l.*

No. 73. ". . . . Farm." New hot water boiler. September 30, 1927. 37*l.*

No. 74. "Lodge Park House." Electric lighting; new battery and replacement of defective battery. January 22; June 21, 1922. 77*l.* 16*s.* 6*d.*

No. 75. "Sherborne House." Electric light rewiring. September, 1926, to August, 1927. 1158*l.* 9*s.* 5*d.*

No. 76. Electric lighting; erection of No. 1 battery. August 6, 1926. 361*l.* 11*s.* 6*d.*

No. 77. Wiring billiard room at Sherborne House. June 15, 1925. 16*l.* 7*s.* 6*d.*

No. 78. Erection of No. 3 battery. June 15, 1925. 189*l.* 8*s.*

No. 79. Installation and erection of oil engine, No. 2 battery and shafting. August, 1923, to June, 1924. 627*l.* 6*s.*

No. 80. Inspector's fee for reporting, etc., on electric lighting installation at Sherborne House. February, 1928. 37*l.* 12*s.* 5*d.*

No. 81. Timber yard. One Titan "Tractor." October, 1926. 22*l.*

By a deed dated November 3, 1926, the tenant for life sold a portion of the settled estates—namely, a farm called "Old Walls Farm"—for 3500*l.* It appeared that prior to the sale, the tenant for life had by careful management and farming, improved the land so sold, and its value had been in consequence considerably enhanced. As a result the tenant for life claimed that the sum of 1000*l.* out of the proceeds of sale was properly attributable to tenant right valuation, and should be paid over to him.

The matter now came before the Court, as above stated, on an originating summons, and whereby the tenant for life claimed, first, that the trustees might be directed out of capital moneys in their hands to apply a certain sum in payment for the works and improvements set out in the above mentioned summary, and executed by him upon the lands subject to the settlement; but so that in respect of

such improvements, the said lands should stand charged with the payment to the trustees of a yearly rent charge, sufficient in amount to discharge such periodical instalments, as the Court should think fit to direct by way of repayment of the sums applied in respect of such improvements.

The tenant for life also claimed, secondly, to be recouped out of the proceeds of sale of the farm, "Old Walls Farm," the sum of 1000*l.*, as being the amount properly attributable for tenant right valuation in respect of the improvements effected by him.

G. B. Hurst K.C. and *J. N. Gray* for the applicant, on the question as to recoupment out of capital moneys to the tenant for life. The tenant for life is entitled to be recouped those sums which he has expended out of capital moneys. There was no need for a scheme. It is true some of these improvements were carried out under the former Settled Land Acts, 1882 to 1890 (see items 74, 77, 78 and 79), and were not authorized improvements under those Acts. But it is submitted the new Settled Land Act, 1925, has altered this, and the Court may now recoup to the tenant for life moneys expended by him on the settled property prior to the coming into force of the Act, and even though such works were not authorized improvements under the Settled Land Acts then in force: see s. 83 of the new Act (1); s. 84 (2);

(1) Settled Land Act, 1925, s. 83: "Improvements authorised by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the works mentioned in the Third Schedule to this Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes."

(2) Sect. 84, sub-s. 1: "Capital money arising under this Act may be applied in or towards payment for any improvement authorised by this Act or by the settlement, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the trustees of the settlement or the court."

Sub-s. 2: "Where the capital money to be expended is in the hands of the trustees of the settlement, they may apply that money in or towards payment for the whole or any part of any work or

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and s. 87. (1) In all these sections "improvements authorized by this Act" mean improvements as laid down by the Act itself (see the Third Schedule, Part III.), and therefore the Court is entitled under s. 87 to make an order enabling these improvements to be defrayed out of capital moneys. It is immaterial therefore that these particular works were carried out under the former Settled Land Acts. Here the tenant for life has not begun a scheme for his own benefit but for the benefit of the settled property. These particular electric lighting installations and works were absolutely necessary. There is nothing in the language of the new Act limiting

operation comprised in the improvement, on :—

(i.) A certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof ; or

(ii.) An order of the court directing or authorising the trustees so to apply a specified portion of the capital money :

Provided that :—

(*a*) In the case of improvements not authorised by Part I. of the Third Schedule to this Act, or by the settlement, the trustees may, if they think fit, and shall if so directed by the court, before they make any such application of capital money require that that money, or any part thereof, shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed.

(*b*) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I. and II. of the Third Schedule to this Act, or by the settlement, except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso."

(1) Sect. 87 : "The Court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, or this Act, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval as required by the Settled Land Act, 1882, to the trustees of the settlement or to the court, and notwithstanding that no capital money is immediately available for the purpose."

improvements to the settled land. The improvements specifically referred to are "authorised by this Act," and these works which the tenant for life has carried out are within the Third Schedule. It is open to the Court to go back a reasonable time: see *Quilter* v. *Mapleson* (1), and consider the date when the works were actually carried out.

Nicholson Combe for the trustees of the settlement, respondents. The scope of the Court's statutory jurisdiction to direct payment for improvements out of capital money is laid down by s. 87 of the Settled Land Act, 1925 (2), which confines that jurisdiction to two categories—namely, improvements authorized by the Settled Land Acts, 1882 to 1890, and improvements authorized by the Act of 1925. The works in question do not fall within the first category. The question whether they fall within the second is answered by s. 83 of the new Act. (3) That section virtually defines what is meant in s. 87 (2) by the words, "any improvement authorised by . . . . this Act." Sect. 83 (3) imports a twofold aspect into the definition—namely, the actual physical doing of the work, and the requirement that the work shall be of one of the descriptions mentioned in the Third Schedule. Those two aspects cannot be severed. Therefore the Court's jurisdiction cannot be invoked, unless one of those descriptions in that Schedule applied when the work was actually executed. But ex hypothesi none of them did then apply.

The case of *In re Ormerod's Settled Estate* (4) must be somewhat against the tenant for life's contention.

R. Wright Taylor for a tenant for life in remainder. It is submitted the trustees' contention is the correct one. The installation of electric light was not an "authorised improvement" until January 1, 1926; it was quite a new innovation to enable a tenant for life to recover it from the estate. If one considers the Fourth Schedule to the new Act, it is clear there is no retrospective operation to meet these particular circumstances; and see also s. 118. Sect. 87 (2) only says that the tenant for life need not submit a scheme.

(1) (1882) 9 Q. B. D. 672, 674.
(2) See note (1), pp. 350, 354.
(3) See note (1), p. 349.
(4) [1892] 2 Ch. 318.

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Hurst K.C. in reply.

[*J. N. Gray* referred to *In re Lord Leconfield's Settled Estates.* (1)]

TOMLIN J. This is an application by the tenant for life to be recouped certain expenditure incurred by him on the mansion house and some other property. This expenditure was incurred from time to time, in part prior to the coming into force of the Settled Land Act, 1925—that is, prior to January 1, 1926—and in part since that Act.

The bulk of the items which are in dispute are concerned with electric lighting. There are, first, two small items, one for heating apparatus, No. 70, and one for a hot-water boiler, No. 73. They have both, I understand, been done since the Act of 1925 came into force, and are clearly within the matters permitted under the Act. They are small items, and I see no reason why they should not be allowed.

The items which are important are those which relate to the electric light. Of those items, No. 75, being a sum of 1158*l.* 9*s.* 5*d.* for rewiring Sherborne House, the mansion house ; No. 76, which is the erection of a new battery, a new No. 1 battery, and a small sum, item No. 80, on account of the electrical engineer who reported on the work. Those are matters which were carried out after the Act came into force. They are matters which seem to be within the works authorized by the Act. I think I am satisfied upon the evidence that there was a condition of affairs in Sherborne House, in relation to the electric light installation, which did properly demand some expenditure of capital money.

Of the other items on which there has been also dispute one relates to the electric lighting of a subsidiary house, called Lodge Park House, and is an item of 77*l.* 16*s.* 6*d.* That was executed in 1922, at a time when work of that kind was not within authorized improvements as they were indicated in the former Acts.

The other items which are in question are the wiring of the billiard room in Sherborne House, a small item of 16*l.* 17*s.* 6*d.*, executed on June 15, 1925, the erection of a No. 3

(1) [1907] 2 Ch. 340.

battery, 189*l.* 8*s.*, also apparently executed in June, 1925, and then there was the installation of an oil engine, No. 2 battery and shafting, at 627*l.* 6*s.*, between August, 1923, and June, 1924.

All those three items were done at a time when, under the law then in force, work of that kind was not an authorized improvement under the Settled Land Acts, 1882 to 1890; and if the law had remained as it then was, the tenant for life would not have been entitled to recover those items out of capital moneys. If he had made an application to the Court under the appropriate section of the Act of 1890, asking the Court to exercise its discretion in his favour, the Court would have been faced with the fact that the improvements were not authorized improvements, and no repayment to him could have been allowed. It is said, however, that, notwithstanding that fact, under the Act which is in force to-day—the Settled Land Act, 1925, and which undoubtedly has enlarged the frontiers of authorized improvements, so as to include within those frontiers, the particular work which is in question—there is power to recoup the tenant for life for the expenditure which was incurred on the settled property before the present Act came into force, and although the work was not authorized by the Acts that were then in force.

Now in order to deal with that problem it is necessary to look at the relevant sections of the Settled Land Act, 1925. The first relevant section is s. 83, which provides that "Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the works mentioned in the Third Schedule to this Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes."

Then, turning to the Third Schedule, I find that it includes work of this character. The other sections which are relevant

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are as follows. [His Lordship read the sections in question. (1)] Of these sections s. 88, sub-s. 1, seems to impose upon the tenant for life an obligation to maintain and repair at his own expense, during such period, if any, as the Minister by certificate in any case prescribes. That would appear to mean that he is under no such liability by virtue of the section,

(1) Settled Land Act, 1925, s. 84, sub-s. 1: "Capital money arising under this Act may be applied in or towards payment for any improvement authorised by this Act or by the settlement, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the trustees of the settlement or the court."

Sub-s. 2: "Where the capital money to be expended is in the hands of the trustees of the settlement, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement, on:—

(i.) A certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or

(ii.) An order of the Court directing or authorising the trustees so to apply a specified portion of the capital money:

Provided that:—

(*a*) In the case of improvements not authorised by Part I. of the Third Schedule to this Act, or by the settlement the trustees may, if they think fit, and shall if so directed by the court, before they make any such application of capital money require that that money, or any part thereof, shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed;

(*b*) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I. and II. of the Third Schedule to this Act, or by the settlement, except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso."

Sect. 87: "The court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, or this Act, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval as required by the Settled Land Act,

unless in fact the Minister in any case by certificate prescribes a time. But his liability as established by the Minister by certificate prescribing a time, is confined to liability to, "maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby." It will be observed that the language is not "every improvement authorised by this Act or the enactments replaced thereby," but it is "every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby. . . . ."

When I turn to the Third Schedule, I find the Third Schedule is divided into three parts. Part I. is: "Improvements, the costs of which are not liable to be replaced by instalments." Part II. is: "Improvements, the costs of which the Trustees of the Settlement or the Court may require to be replaced by instalments." Part III. is: "Improvements, the costs of which the Trustees of the Settlement and the Court must require to be replaced by instalments."

Now, under Part II., under improvements which the Court may require to be replaced by instalments, I find in sub-para. (iii.): "The erection and building of dwelling-houses, shops, buildings for religious, educational, literary, scientific, or public purposes, market places, market houses, places of amusement and entertainment, gasworks, electric light or power works, or any other works necessary or proper in connexion with the development of the settled land, or any part thereof as a building estate."

Then in Part III., under "Improvements, the costs of which the Trustees of the Settlement and the Court must require

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1882, to the trustees of the settlement or to the court, and notwithstanding that no capital money is immediately available for the purpose."

Sect. 88, sub-s. 1: "The tenant for life, and each of his successors in title having under the trust instrument a limited estate or interest only in the settled land, shall, during such period, if any, as the Minister by certificate in any case prescribes, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall at his own expense insure and keep insured the improvement in such amount, if any, as the Minister by certificate in any case prescribes."

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to be replaced by instalments," I find: (i.) Heating, hydraulic or electric power apparatus for buildings, and engines, pumps, ..., and other works required or used in connexion therewith; and (ii.): "Engine houses, engines, gasometers, dynamos, accumulators, cables, pipes, wiring, switchboards, plant and other works required for the installation of electric, gas, or other artificial light, in connexion with any principal mansion house, or other house or buildings; but not electric lamps, gas fittings, or decorative fittings required in any such house or building."

It seems, therefore, that at any rate this improvement, assuming for the moment that the improvements are such as ought to be provided for out of capital moneys, are improvements in respect of which the Court must require the costs to be replaced by instalments.

Now, the first point that I have to determine is in regard to that part of the work which was executed before this Act of 1925 came into force. It is said on behalf of the tenant for life, who seeks to secure the recoupment of the money, that the language in ss. 83 (1), 84 (2) and 87 (3), where the phrase, "Improvements authorised by this Act" is used, means improvements of the kind set out in the Act as authorized improvements; it does not mean improvements in fact executed under the particular Act and being of a kind which may be executed under the particular Act, but it means "improvements," authorized in the sense of being of the character which the Act prescribes as the necessary character to enable the work to be done out of capital moneys; and, that being so, it is plain, under s. 87 (3), the court may make an order authorizing capital moneys to be applied towards payment of these particular improvements, because they are improvements authorized by this Act of 1925, and it makes no difference—there is no limit in time—that they were in fact executed before the Act came into force.

On the other hand, it is said: No; "authorised by the Act" means executed pursuant to the authority of the Act; and that when you turn to s. 88 (4), which contains the

(1) See note (1), p. 349.
(2) See note (2), p. 349, and note (1), p. 354.
(3) See note (1), pp. 350, 354.
(4) See note (1), p. 355.

provision as to the liability of the tenant for life, you find that phrase implied; there is, in fact, a change of phrase—"every improvement executed under the foregoing provisions of this Act"—and that, if the applicants' case and construction of the Act is well founded, you have this curious result: that if you execute an improvement within the meaning of the old Acts; under the old Acts the tenant for life can get repaid, and he is liable for maintaining the improvement in repair if the Minister prescribes a time. And, again, if there is an improvement within the scope of the new Act, and executed under the new Act, he is liable for repair of that improvement. But if there is an improvement not within the scope of the old Acts but executed before the new Act came into force, when repayment of the capital money is authorized under s. 87 (1), you have this curious result—that you have an improvement for which you can pay by capital moneys under s. 87 (1), but in respect of which you can fix on the tenant for life no liability for repair. That is the argument; and it is said that for that reason I must come to the conclusion that "authorised by the Settled Land Acts, 1882 to 1890, or this Act," must mean executed under those Acts.

Of course, there is this observation to be made upon that theory: the draftsman of this Act, which has been drawn with so much care and elaboration, in two sections side by side, has seen fit to use two different phrases, and it is a little curious if when he used the phrase "authorised by this Act" in s. 87 (1), he meant the same thing as "executed under the foregoing provisions of this Act" in s. 88. (2) If it is to be said that he must have meant the same thing by both sections, it may be that it is proper to read, "improvements executed under the foregoing provisions of this Act," as really only meaning an improvement which has been paid for under this Act; and that if, on its true construction, s. 87 (1) authorizes repayment of capital moneys for an improvement, because it is authorized by this Act, then that may be, for all I know, what he meant by "an improvement executed under the foregoing provisions of this Act." So that the argument

(1) See note (1), pp. 350, 354. (2) See note (1), p. 355.

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which is used against the tenant for life might conceivably be said to fit equally well the other way.

That leads me to this conclusion, that there is only one safe rule, and that is to adhere to the language and to give to the words their natural meaning, and not to attempt to give to one section an artificial meaning, because you think that by doing so you will make it fit in better with some other section. I prefer to assume that the draftsman of the Act, when he used a different phrase, for some reason or other, meant a different thing, and that "authorised under this Act" does mean literally, and that is the literal sense of it, "an improvement authorised by the Settled Land Act"; it means improvement of a particular kind; and, that being so, if the court is satisfied that the improvement in respect of which payment is asked is improvement of the particular kind authorized by the Act, and is also satisfied in all the circumstances of the case that it ought to be paid, then there is jurisdiction to order capital moneys to be so applied, notwithstanding that the improvement has been executed before this Act came into force.

That being so, the result is that, in my view, there is jurisdiction, if I think proper to exercise it, to authorize payment of these works out of the fund.

Now that brings me to the actual details of the whole matter. I am quite satisfied on the evidence that the condition of the wiring of this house was such that sooner or later there would have had to be such a reconstruction of the electric lighting installation as could fairly and properly have been paid for out of capital moneys. In that reconstruction I have not any doubt that such items as 77, 78 and 79 would have been included; and I have no reason to think that the work was not properly done; indeed, the evidence of the gentleman who made the report makes it plain that it was. The only doubt in my mind is whether, having regard to the fact that some of the work has been done for some years, I ought not in some way to be satisfied that to-day the whole sum ought to be repaid out of capital, or whether there ought not to be some rebate upon the footing that, having regard

to lapse of time, there is some diminution in the value of the improvement.

I think it may very well be said with regard to the batteries and matters of that sort—I do not know what the life of a battery is in an installation of this kind, but, at any rate, they have terminable lives—that four or five years out of the life of a battery is a very substantial diminution of its present-day value.

That being so, I am not satisfied, without further evidence, that I ought to allow the total sum. But I feel some difficulty in arriving at a solution of the question what rebate, if any, ought to be allowed. I am disposed to deal with it in this way, and I can only deal with it, of course, in this way, if Mr. Hurst, on behalf of the applicant, assents. I myself suspect that the rebate would be small, having regard to the time. What I propose to do is this: I propose to omit the items 74, 77, 80 and 81, treating them as omitted, not because they may not be items which can properly be paid, but as being some method of giving a small rebate upon the total sum. By that I mean that I will allow the total sum of the items, omitting a sum corresponding with those four items as a rebate, that is, a sum which will be equal to the total of the items with those four deducted, in satisfaction of all those items, and any balance the tenant for life will have to make up out of his own pocket.

[His Lordship then directed, that as regards the remaining items the amount should be repayable in accordance with the Settled Land Act, 1925, s. 84, sub-s. 4 (1), and the Third

(1) Settled Land Act, 1925, s. 84, sub-s. 4: "Where the court authorises capital money to be applied in payment for any improvement or intended improvement not authorised by Part I. of the Third Schedule to this Act or by the settlement, the court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III. of that Schedule (unless the improvement is authorised by the settlement), require that the whole of the capital money shall be repaid to the trustees of the settlement out of the income of the settled land by a fixed number of periodical instalments to be paid at the times appointed by the court, and may require that any incumbrancer of the estate or interest of the tenant for life shall be served with notice of the proceedings."

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Schedule thereto, in fifteen years by half-yearly instalments; the first instalment to be payable on January 1, 1929.]

On the second point, as to the tenant for life's claim to be repaid the sum of 1000*l.* out of the proceeds of sale of "Old Walls Farm" for tenant right valuation.

Hurst K.C. and *J. N. Gray* for the applicant. This land has been considerably improved in value by the tenant for life, and he is therefore entitled to be recouped a certain proportion of the cost out of the proceeds of sale.

Nicholson Combe for the trustees. As to the 1000*l.* claim, if the Court has a discretion to allow it, the Court will not do so for reasons given by Eve J. in *In re Foster's Settled Estates.* (1) But to hold that the Court has a discretion to alter the careful balancing of rights between capital and income worked out by the Settled Land Act, 1925, would be, it is submitted, to hold that the Court can legislate.

TOMLIN J. This is a further application by Lord Sherborne, as tenant for life, for payment of a sum of 1000*l.* out of the purchase money of a certain farm which has been sold for 3500*l.* As I understand it, he puts his claim to-day in this way. He says that in 1922 he bought the outgoing tenant's tenant right at some 570*l.* or thereabouts, and that he has so farmed the land since, and has spent such considerable sums in laying down temporary pasture, applying basic slag and otherwise dealing with the land, no doubt in a very favourable manner, that in those circumstances he ought to be paid 1000*l.* out of the purchase price; and that the contract was really a contract for the sale of land for 2500*l.* and of the tenant right for 1000*l.*

Now it seems to me to be a claim of rather a novel kind, for the tenant for life, who is in possession of some part of the settled land, to make against the trustee. It is a claim in respect of money paid by a purchaser of land, a claim to some part of the purchase money by way of tenant right. I do not think there is any such right in the tenant

(1) [1922] 1 Ch. 348, 353.

for life. But it is plain to me that the claim as framed at the time is shown by the agent's letters. He says: "Lord Sherborne will claim part of the purchase money in respect of 'Old Walls Farm,' as it included a considerable amount which was due to him for improvements and which is really due to the tenant. Lord Sherborne went to considerable expense in putting this land all down to temporary pasture, and applied basic slag to same, which was the reason this land was so much improved, and enabled me to sell it at a considerable profit. I estimate at least 1000*l.* of the purchase money should be credited to Lord Sherborne."

It will be observed, first of all, that there is no reference there to what was paid to the outgoing tenant for tenant right, I daresay for the good reason that by the time this sale was effected, that ought to have been long since exhausted. What he is really claiming is to be repaid out of capital, moneys for an improvement which is not within the Settled Land Acts—that, and nothing else. It seems to me that if I were to assent to any such proposition as this, that the tenant for life who happens to be in occupation of the land and cultivating it himself, is entitled to sell the land and make it a bargain with the purchaser that some part of the purchase money should be treated as tenant right belonging to the tenant for life, I should be opening up a very wide door for transactions which might be seriously impeached. I do not propose to do anything of the kind. I propose to take the view that the tenant for life here is applying to be recouped for an improvement which is not within the Acts and which I have no jurisdiction to allow. I, therefore, disallow the application.

Solicitors: *Peacock & Goddard, for Mullings, Ellett & Co., Cirencester; Nicholl, Manisty & Co.; Mills, Curry & Gaskell.*

A. R. T.

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1928
Nov. 9.

In re A DEBTOR.

[737 of 1928.]

Bankruptcy—Act of Bankruptcy—Statement made by Debtor in Conversation with Representative of Petitioning Creditor—Notice by Debtor that he "has suspended or is about to suspend payment of his debts"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*h*).

At an interview between a debtor and the managing clerk of a London firm of solicitors, who had been appointed under a power of attorney to represent the petitioning creditors, who were a Swiss firm, the debtor stated that he had liabilities to creditors in Switzerland amounting to about 26,000*l.*; that bankruptcy proceedings were there pending against him; that he proposed to call a meeting of his Swiss creditors and to offer them a composition of 1000*l.* in settlement of all his liabilities upon condition that they agreed to release certain goods in the hands of their agents in England of the value of 800*l.*, which sum he would be able to make up to 1000*l.*, but that beyond that sum he had not a single penny. If the creditors accepted that composition he would offer his English creditors a composition of 5*s.* in the pound spread over a period of years; but that in the event of his Swiss creditors refusing to accept the proposed composition he would not have the slightest objection to any of his English creditors filing a petition in bankruptcy and would give all assistance to such proceedings:—

Held, that the verbal statements so made constituted a notice by the debtor that he had suspended payment of his debts within s. 1, sub-s. 1 (*h*), of the Bankruptcy Act, 1914, and that the managing clerk being the representative of one of the creditors, the notice was a valid notice to a creditor within cl. (*h*).

Crook v. *Morley* [1891] A. C. 316 and *Clough* v. *Samuel* [1905] A. C. 442 applied.

Appeal by the debtor from a receiving order made against him by Mr. Registrar Francke on October 17, 1928.

The debtor was of Swiss nationality and was an employee of a London firm. He also carried on business on his own account.

The petitioning creditors were a Swiss firm carrying on business in Switzerland, who had supplied the debtor with goods for which he had given them fourteen bills of exchange, all of which had been dishonoured on presentation. The total amount of the debtor's indebtedness to the petitioning creditors was 5916*l.*, being as to 4716*l.* 3*s.* 10*d.* for the balance of the amount due on the fourteen bills of exchange and as to 1199*l.* 16*s.* 2*d.* for further goods sold and delivered.

No judgment in respect of the debt had been obtained, but the debt was not disputed.

The petitioning creditors had by a power of attorney appointed a London firm of solicitors to act for them in England.

The substantial question for the decision of the Court was whether certain statements made by the debtor at an interview between him and the managing clerk of the solicitors appointed to represent the petitioning creditors amounted to a notice by the debtor that he had suspended or was about to suspend payment of his debts within the meaning of s. 1, sub-s. 1 (*h*), of the Bankruptcy Act, 1914. There was also a further question whether, having regard to the fact that bankruptcy proceedings had been commenced in Switzerland by the debtor's Swiss creditors, the Registrar ought not to have made the receiving order.

The following statement of the facts upon which the petitioning creditors relied as bringing the case within s. 1, sub-s. 1 (*h*), of the Bankruptcy Act, 1914, is taken from the judgment of the Master of the Rolls: "It appears that on May 22, 1928, a managing clerk to the solicitors who held this power of attorney called upon the debtor and had a conversation with him. The call was avowedly made for the purpose of discussing with the debtor his prospects of liquidating the debt admittedly due to the petitioning creditors. I need not trouble further with what happened on that day, except to say this, that it was then arranged that there should be a second interview on the following day, and the second interview was for the purpose of giving to the managing clerk all information that was required by him. When that interview took place on May 23, the debtor made certain statements. He gave the information that he had heavy liabilities in Switzerland, where he had apparently what is known to the Swiss Courts as a trading domicil. He informed the managing clerk that he had in Switzerland Swiss liabilities amounting approximately to 26,000*l.*, and that a meeting of his Swiss creditors was to take place on June 4. He also gave the information that in addition to

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the Swiss liabilities he had English creditors for sums amounting to something between 1500*l.* and 1600*l.* He then stated that he intended to offer the Swiss creditors the sum of 1000*l.* in cash in settlement of all his liabilities to them upon the condition that they, the Swiss creditors, should instruct their English agents to release certain goods held by such agents in England which were of the approximate value of 800*l.*, which said goods he would then realize, and he would then be able to provide a sum of 1000*l.* The debtor would thereby get certain goods of the value of 800*l.* released from the realization of which it would be possible for him to be placed in funds to the extent of a total of 1000*l.*, with which 1000*l.* he would deal with his Swiss creditors. The debtor also said 'that his sole assets both in England and in Switzerland, including the said goods, amounted to approximately the said sum of 1000*l.* and that beyond that sum he had not a single penny.' Then the following passage occurs in the affidavit of the managing clerk on which Mr. Clayton for the debtor has rightly spent some time in criticizing: 'The debtor informed me that it was his intention in the event of the Swiss creditors adopting the composition above referred to to get into touch with his English creditors and offer them a composition of 5*s.* in the pound spread over a period of years.' That, of course, is a conditional offer, an offer that if he has satisfied his Swiss creditors and they have accepted a composition, then and in that event he would be able to offer his English creditors 5*s.* in the pound, a sum to be paid over a period of years. Supposing that condition or hypothesis is not fulfilled, then he goes on: 'and that in the event of the Swiss creditors not accepting the composition hereinbefore referred to he the debtor stated that he would not have the slightest objection to any one of the English creditors filing a petition in bankruptcy and would give all assistance to such proceedings.' The debtor further added that he had no hope or the slightest prospect of making any larger offer than that to which I have already referred, as he was merely an employee of a London company."

The appeal was heard on November 9, 1928.

Clayton K.C. and *Oscar Kean* for the debtor. In order that there should be an available act of bankruptcy within s. 1, sub-s. 1 (*h*), of the Bankruptcy Act, 1914, the debtor must give "notice to any of his creditors that he has suspended, or is about to suspend payment of his debts." A mere oral statement made by the debtor that he is unable to pay his debts in full, is not a notice that he has suspended or is about to suspend payment of his debts within the meaning of cl. (*h*): *Ex parte Oastler.* (1) If this were so cl. (*f*) of the same sub-section would be unnecessary. That clause requires that a declaration of inability to pay debts should be filed in the Court, and, therefore, to be in writing.

[LORD HANWORTH M.R. I do not see that cl. (*h*) and cl. (*f*) are mutually exclusive. They show two different courses which are open to the debtor.]

In *Ex parte Oastler* (1) Baggallay L.J. in the course of the argument, addressing counsel for the petitioning creditors, said (2): "Sub-s. 1 (*f*) requires that a declaration of inability to pay debts should be 'filed in the Court' in order that it may constitute an act of bankruptcy. Do you say that such a declaration, when it is not filed, is equivalent to a notice of suspension of payment, and is, therefore, an act of bankruptcy?" Here the debtor was not dealing with a creditor but with a solicitor's clerk. The statements made by him were not intended as a notice, but were answers made by him in the course of conversation for the information of the managing clerk.

[GREER L.J. Did they not in fact amount to a notice that the debtor had suspended payment of his debts?]

It is submitted that they did not.

The case is distinguishable from *In re Crook* (3), where the debtor sent a circular to his creditors in which he said: "Being unable to meet my engagements as they fall due, I invite your attendance" [at a specified place and time] "when I will submit a statement of my position for your consideration

(1) (1884) 13 Q. B. D. 471.
(2) Ibid. 473.
(3) (1890) 24 Q. B. D. 320; affirmed in H. L. sub nom. *Crook* v. *Morley* [1891] A. C. 316.

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and decision," and it was held that the circular was a good notice that the debtor was "about to suspend payment of his debts." The facts there were totally different from those in this case.

The true principle is that laid down by Stirling L.J. in *In re Reis* (1): "The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due, at least for a time." See also the same case on appeal to the House of Lords sub nom. *Clough* v. *Samuel* (2), per Lord Halsbury (3) and per Lord Macnaghten. (4)

There is a further ground on which it is submitted the order ought not to have been made. It is admitted that the Registrar had jurisdiction to make the order, but it is submitted that in the exercise of his discretion he ought not to have made it in the circumstances. Here there is already an existing bankruptcy in Switzerland, where all the principal creditors of the debtor reside. There is, therefore, no advantage to be derived from there being a second bankruptcy in this country: *Ex parte Robinson* (5); *In re Artola Hermanos.* (6)

W. N. Stable for the petitioning creditors was not called upon to argue.

LORD HANWORTH M.R. This is an appeal by the debtor, who it is not disputed is within the jurisdiction of the Bankruptcy Act, 1914, and is trading over here. As a matter of fact, he holds a small appointment in a London company, but apparently he also engages in trading transactions, buying goods from his friends with whom he is in communication in Switzerland, and paying for them by bills drawn upon him by the traders in Switzerland.

(1) [1904] 2 K. B. 769, 779.
(2) [1905] A. C. 442.
(3) Ibid. 443, 444.
(4) [1905] A. C. 446.
(5) (1883) 22 Ch. D. 816.
(6) (1890) 24 Q. B. D. 640.

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The facts are these. There is no question that there is a debt due from the debtor. The debt is a considerable one; it is for a sum of 5916*l*. There has been no judgment in respect of it, but the debt is not in dispute. The petition for a receiving order was lodged by a Swiss firm of creditors who had appointed under a power of attorney a London firm of solicitors to act for them. We have not seen the power of attorney, but it was put in before the Registrar. Notice was given by the debtor disputing the act of bankruptcy. The act of bankruptcy which is relied upon is that the debtor had within the terms and meaning of s. 1, sub-s. 1 (*h*), of the Bankruptcy Act, 1914, given notice to his creditors that he had suspended or was about to suspend payment of his debts.

The facts which were relied upon as bringing the debtor within sub-s. 1 (*h*) were these. [His Lordship stated the facts as above set out and continued:] It is said that, taken in its proper setting, that information, to use a colourless word, given by the debtor, does not amount to the giving of notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts. It appears to me that the requirements of sub-s. 1 (*h*) are fulfilled. The debtor had before him at the interview the representative of one of his creditors. I do not think that the position of the managing clerk to the firm of solicitors who held a power of attorney from the creditors prevents him from being the representative of one of the creditors in question, and in that sense being the person who is referred to as the person to whom a notice has to be given.

But it is said that the information that is given is in a sense a mere discussion of the debtor's affairs, a discussion, I will not say of a confidential nature but of a somewhat intimate character, when the debtor made a clean breast of it and stated quite frankly what his actual position was. But even though at first I was inclined to take that somewhat benevolent view, I find it impossible, looking at all that passed at that interview, to say that the debtor did not mean to convey or did not in fact convey to the managing clerk that

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he had no intention of paying any one, and in that sense that he had suspended payment of his debts. It appears to me to be a plain indication that he had no money at that time with which to defray his debts, that his only chance of having any money in England for the purpose of paying a composition to his creditors was a chance based on the hypothesis that the Swiss creditors would sanction a release of goods to the value of 800*l.*, and, in the alternative of their not doing so, it was made plain by him that bankruptcy proceedings must immediately follow, proceedings which he would facilitate. Those statements when they are summed up make it, to my mind, quite plain that he did give notice to one of his creditors that he had suspended payment of his debts.

Mr. Clayton has called our attention to a number of cases bearing upon this question. In *Clough* v. *Samuel* (1) Lord Macnaghten tells the story of how s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883 (which corresponds to s. 1, sub-s. 1 (*h*), of the Act of 1914), came to be inserted in that Act. He says: "Why was this provision introduced? Certainly not in order to afford the debtor an opportunity of communicating to his creditors the fact of his insolvency so that they might, if they should think proper, take proceedings to make him bankrupt. A declaration by a debtor of inability to pay his debts filed in the prescribed manner was an act in bankruptcy already. The object of the new departure is stated, and stated, I think, correctly, in the case of *In re Wolstenholme* (2), by one of the counsel in the course of his argument: 'Before the year 1883,' Mr. Yate Lee is reported to have said, 'it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors. That was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings.'" So that the intention of the section, and as drawn it appears to convey it, was that a

(1) [1905] A. C. 442, 445. (2) (1885) 2 Morr. 216.

notice of having suspended payment should be an act of bankruptcy.

What interpretation then is to be placed upon these words? Although it has been useful and helpful to us to go through all the judgments, I do not think I need go through them again, but I should like to call attention to the words which are used by Stirling L.J. in *In re Reis* (1): "The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts." As some criticism may be directed to the statement made by Lord Macnaghten in *Clough* v. *Samuel* (2), a statement with which I respectfully agree, as to the interpretation of cl. (*h*) and what is necessary under it, I prefer in this case to refer to the words of Stirling L.J. (1), because I think they are sufficient to enable me to arrive at a right conclusion, the words, namely: "We have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts." It appears to me that the words in this case to which I have referred show without either hesitation or any doubt clear evidence of an intention on the part of the debtor to suspend, and in that he has suspended payment, the emptiness of his trading till is abundantly revealed. I will also add that in the earlier case of *In re Crook* (3), to which our attention was called—and I think it was confirmed on this point in the House of Lords (4)—it was said by Lord Esher M.R.: "It is necessary in each case to estimate the reasonable construction which those persons who receive such statement of the debtor would, under the circumstances of the debtor's case, have a right to assume to be his meaning as to what he intends to do with respect to paying or suspending payment." It appears to me that no man of sense, no business man, no managing clerk to solicitors accustomed to deal with business affairs could fail

(1) [1904] 2 K. B. 769, 779.
(2) [1905] A. C. 442, 445.
(3) 24 Q. B. D. 320, 323.
(4) Sub nom. *Crook* v. *Morley* [1891] A. C. 316.

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to appreciate that the effect of the statement made by the debtor was that he had suspended payment of his debts, and, indeed, that he had no hope or at most but a hypothetical hope of being able to make payment at all.

I will only add this, that the view that I venture to express as to the difference in meaning between cl. (*h*) and cl. (*f*) appears to be the view which Lord Selborne held in *Crook* v. *Morley* (1), to which we have been referred. It seems to me, therefore, that, construing this clause as the cases have laid down that it ought to be construed, there is here abundant evidence to show that an act of bankruptcy has been committed.

On the second point that there are already proceedings in bankruptcy pending in Switzerland, and, therefore, that as a matter of discretion the receiving order ought not to be made, I am unable to accept that view. No doubt is thrown upon the jurisdiction of the Registrar to make the order, but it is said that in the exercise of his discretion he ought to have had regard to the fact that the larger debts are in Switzerland, and that an order which is equivalent to a bankruptcy order has been made in Switzerland, and ought therefore to have held that there was no necessity to make an order over here. It appears to me that inasmuch as there are debts over here, the debtor is over here and the jurisdiction is not disputed, the Registrar was acting well within his discretion in making the order. More than that, I think the order was rightly made. If difficulties arise hereafter in the carrying out of the bankruptcy proceedings in this country as well as in Switzerland, they will be matters to be dealt with in the course of the bankruptcy proceedings. But upon the plain statement by the debtor it seems to me, that this is a case which is rightly brought into bankruptcy and that the appeal therefore must fail. The appeal will be dismissed with the usual order as to costs.

GREER L.J. I agree. The Registrar has made a receiving order against the debtor on the ground that he committed

(1) [1891] A. C. 316.

an act of bankruptcy within the description given in sub-s. 1 (*h*) of s. 1 of the Bankruptcy Act, 1914, which is in these terms : "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." It is said there is no evidence upon which the Registrar could hold that the debtor had given notice either that he had suspended or that he was about to suspend payment of his debts. The greater part of the lucid argument put before us by Mr. Clayton was addressed to the second alternative, that there was no evidence that the debtor gave notice that he was about to suspend payment of his debts. If that had been the only question involved in this appeal I should have liked to consider the matter a little more fully than I have yet done, because I appreciate the strength of the argument that has been put forward that a mere statement that a debtor is in difficulties, a mere statement that he cannot pay his debts, is not sufficient to amount to an act of bankruptcy under sub-s. 1 (*h*) ; and I appreciate too the full force of the argument that commended itself to the Court in *Ex parte Oastler* (1), that it is impossible to hold that a mere statement that a debtor is in difficulties and cannot pay his debts is an act of bankruptcy under cl. (*h*), because cl. (*f*) makes it necessary in order that a mere statement of inability to pay debts should be an act of bankruptcy it should be in writing and should be filed. That argument, I think, is a very forcible one ; it commended itself to the Court in *Ex parte Oastler* (1), and it commends itself to me, notwithstanding that it received some criticism in *Crook* v. *Morley* (2), from Lord Selborne. But Lord Selborne's speech and the words that have been cited to us merely mean this, that you are not confined to the literal meaning of the words used in order to ascertain whether they do amount to a notice that a debtor is about to suspend ; a statement by a debtor that he cannot pay his debts may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances to which you are entitled to look for the purpose of interpreting words

(1) 13 Q. B. D. 471. (2) [1891] A. C. 316.

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that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due. That is, I think, the whole meaning of what Lord Selborne says in his judgment of *Crook* v. *Morley*. (1)

But here we are not merely concerned with the question whether the statements which were made at the two interviews amounted to notice of intention to suspend payment of debts, because, in my judgment, they clearly amounted to a notice that the debtor had suspended payment of his debts. He made them to a representative of a creditor. It is just the same as if he had made them to the creditor himself. What an agent of one person says to another is, of course, binding upon the principal, and the receipt by an agent of the statement, the agent being the representative of the creditor, is just as good for this purpose as if the statement had been made directly to the creditor himself. I cannot escape from the conclusion that when in answer to the question what he was going to do about payment of this debt, the debtor told that creditor that he had been made a bankrupt in Switzerland, he was saying to the creditor expressly or by necessary implication: "My property has ceased to be my property; my debts are not going to be paid by me; they are going to be paid and must necessarily be paid by the syndic, or trustee, of my estate. I am not going to pay them; I may arrange a composition; I have hopes of arranging a composition in Switzerland, and I may arrange a composition here; but payment of my debts has most clearly been suspended by what has taken place in Switzerland." I cannot escape the conclusion that that is a statement that he has suspended payment of his debts.

Then is it a notice? There is very little help to be found in the authorities as to what is the meaning of the word "notice." Lord Halsbury in *Clough* v. *Samuel* (2) says, at any rate, it must be a notice, whatever that may mean. That does not help us very much. It seems to me that it must at any rate be something of this sort, a statement which is intended

(1) [1891] A. C. 316. (2) [1905] A. C. 442, 444.

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to give the creditor to understand that the debtor has in fact suspended payment. You need not use the word "notice." If the debtor had said to this gentleman: "Take notice, I give notice to you acting for the creditors whom you represent—I give you notice of all these facts"—it can hardly be suggested here that that would not have been a notice that he had suspended payment of his debts. He did not use the words "I give you notice," but what he did say he said in answer to a question as to what he was going to do about the debt. I think the reasonable interpretation of that is that he did in substance say: "Take notice, observe, that I am a bankrupt, and, therefore, that I have suspended payment of my debts by becoming a bankrupt in Switzerland, and your only hope is for some kind of composition." Under those circumstances I think the Registrar was quite right in the view that he took.

I wish to say nothing beyond what my Lord has already said on the other point with reference to the question whether the order ought to have been made having regard to these proceedings in Switzerland. I see no reason to interfere with a discretion which undoubtedly the Registrar has, and which he has exercised.

RUSSELL L.J. I am of the same opinion. As I read the conversation which took place between the representative of the creditors and the debtor on May 23, the debtor made a statement that he had suspended payment of his debts. I take that view for this reason, that he held out to the representative of the creditors the fact that he was going to offer his Swiss creditors a composition of so much in the pound. He held out to the representative of the creditors also the fact that he might in the future offer the English creditors a composition. That statement, in my opinion, can only have been made by the debtor upon the footing that in the meanwhile he would not pay his debts in the ordinary course as they became due. The circumstances of this case appear to me to bring it within the language used by Lord Selborne in *Crook* v. *Morley* (1), where he said: "I cannot

(1) [1891] A. C. 316, 321.

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help thinking that every creditor receiving that circular must have understood that he would not do or attempt to do that which he said he was unable to do, he would not attempt to meet any of his engagements as they fell due. The very object of so writing to all the creditors is, in substance, to request them to act upon the footing that he is not going on to make payments." It is said that the authority of that case is in some way impaired by the subsequent decision of the House of Lords in *Clough* v. *Samuel.* (1) As I read the speeches in that case there was no divergence of opinion as to the proper construction of cl. (*h*), the only point upon which the majority and the minority of the Lords differed was as to what was the true result of the words used by the solicitor, Mr. Spyer, to the creditors in that case. Lord Halsbury and Lord Robertson held that upon the true construction of what passed, there was no such notice as was required by cl. (*h*). Lord Macnaghten, on the other hand, held that upon the true construction of what passed, there was such a notice. Lord Macnaghten in his speech states what in his opinion fulfils the requirements of cl. (*h*), and he uses this language (2): "The notice need not be in writing. It is enough if notice is given to any one of the creditors. No particular form is required. There is nothing said in the Act about the debtor's intention. The question is what effect would the communication have on the minds of the persons to whom it is addressed. That is the test as laid down in this House. It is only a matter of common sense, as A. L. Smith L.J. observed. All that is required is that a communication proceeding from the debtor, made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment." In the present case the communication was one which proceeded from the debtor. It was not a haphazard or casual communication. It was a communication seriously made and made upon an appointment arranged for the purpose of discussing the debtor's position. Further,

(1) [1905] A. C. 442. (2) [1905] A. C. 446.

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as I have already said, it was, in my opinion, a statement from which the creditors to whose representative it was made would necessarily understand that the debtor had in fact suspended payment of his debts as they became due in the ordinary course. For these reasons, as far as concerns the first point of the argument before us, I agree that this appeal fails. As regards the second point, it does not occur to me to add anything to what my Lord has already said.

Appeal dismissed.

Solicitors for appellant: *Denton, Hall & Burgin.*

Solicitors for respondents: *Herbert Oppenheimer, Nathan & Vandyk.*

W. I. C.

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[1926. H. 4066.]

Burial—Cemetery—Private Vault—Right of Burial—Access to Vault—Limitation of Right—Cemeteries Clauses Act, 1847 (10 & 11 *Vict. c.* 65), *ss.* 40, 42—*Public Health (Interments) Act*, 1879 (42 & 43 *Vict. c.* 31), *s.* 2, *sub-s.* 2.

The exclusive right of burial in part of a cemetery granted by a local authority under s. 2 of the Public Health (Interments) Act, 1879, which incorporates the Cemeteries Clauses Act, 1847, to a grantee who has purchased the right to erect a vault on the space set apart for the purpose of the grant, is a right of interment of the dead therein and of keeping the vault in reasonably good repair subject to such regulations as the local authority think fit. The grantee has no freehold interest in the space or the vault and no right to use them for the purpose of performing private rights or ceremonies, or to open or enter the vault for the purpose of depositing articles therein, without the consent of the local authority.

McGough v. *Lancaster Burial Board* (1888) 21 Q. B. D. 323 applied.

Judgment of Eve J. [1928] Ch. 671 affirmed.

APPEAL from the decision of Eve J. (1)

The following statement of the facts is substantially that of the learned judge in the Court below.

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The plaintiff, Miss Gertrude Remira Hoskins-Abrahall, in July, 1915, became the grantee under ss. 40 and 42 of the Cemeteries Clauses Act, 1847, of the exclusive right of burial in two contiguous grave spaces in Paignton Cemetery. In one of these spaces the body of her mother, who died in June, 1915, was buried in what was described as an urban grave.

The defendants were the burial authority for the parish of Paignton and the owners of the Paignton Cemetery, and the grantors of the rights of burial by virtue of the Public Health (Interments) Act, 1879, which incorporates the Cemeteries Clauses Act, 1847.

In April, 1920, the plaintiff acquired the exclusive right of burial in two other spaces adjoining the former two. The four spaces were in that part of the cemetery which was set apart for the burial of the dead according to the rites of the Established Church, and were numbered 1932, 1933, 1962 and 1963 respectively. They were granted to the plaintiff under ss. 40 and 42 of the Cemeteries Clauses Act, 1847 (1), to hold the same to the plaintiff for the purposes of burial, subject to the regulations then in force or which thereafter might be issued with regard to interments in the cemetery by the Home Secretary or by the defendants or by any other competent authority.

In 1920, in consideration of a payment of 5*l.* 5*s.*, the plaintiff obtained permission to erect a vault on the four spaces. The coffin of her mother was not moved, but was enclosed in a brickwork cell covered by stone slabs embedded in cement. The vault was some seven or eight feet long and five feet

(1) By the Cemeteries Clauses Act, 1847, s. 40: "The company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell, either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart, or the right of one or more burials therein, and they may sell the right of placing any monument or gravestone in the cemetery . . . ."

By s. 42 the grant of the exclusive right of burial may be made in the form in the schedules to the Act or to the like effect. According to a regulation made by the defendants, their written consent is necessary in order to open a vault in which the right of burial has been purchased.

wide; it was erected partly below and partly above ground; one side of it ran along the side of the brickwork cell in which the coffin lay; on the other side was a space from one foot six inches to two feet wide between the side of the vault and the side of the receptacle. The stone slabs on the top of the receptacle formed a shelf or table. Access to the interior of the vault was obtained at first by means of a door fitted with a lock of which the plaintiff had a key, and afterwards by a panel or shutter closed by screws. The door and shutter could be reached by descending into a hole a few feet deep outside and at one end of the vault and protected by a stone slab laid over it.

For the first four years after the construction of the vault the plaintiff paid an annual visit to the cemetery and entered the vault, carrying with her, as she said, "the usual vault furniture," that is to say, a small chair, table, screen, vessels for flowers and several aromatic gums and deodorizers. The caretaker of the cemetery, who knew of these visits and opened the vault for the plaintiff, did not inform the clerk of the defendants of what was being done until November, 1924. The clerk thereupon instructed the caretaker that no further entry into the vault was to be permitted without the leave of the Council.

In January, 1925, the plaintiff's solicitors were informed that the Council would not allow the vault to be opened except for the purpose of future interments, and on January 17 the plaintiff was prevented from entering it. She thereupon engaged a firm of stonemasons to prepare plans for a mausoleum which she contemplated erecting. In February an employee of this firm obtained access to the vault. The following extracts from a letter dated February 18 and written to the plaintiff by this man shows that he went to the vault for other purposes besides those connected with the mausoleum. He says: "I, together with another of our firm's men, removed the flag stones, opened the door and waited a little. I had the lamp lit, made the charcoal hot, put it in the swinging receptacle and carried out your instructions of waving it in front of the opening, gradually lowering until I entered the

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vault. The cypress branches I burnt too. The food I cleared from the top of the tomb and swept that part clearing everything away. The food from the tables was cleared too. I removed a lot of sawdust, but on account of no fresh supply of cypress sawdust I left most on the floor as I had found it. The tumbler was washed and I poured the wine in the tumbler and placed it on the tomb, previously tasting a little as you wished. The wine was quite good. I must admit I forgot to buy coffee or milk and due to the day being Wednesday, which is early closing day at Paignton, I was unable to obtain any. I was not able to procure a tent at this stage. At about 5.30 P.M. I closed the door and replaced the flag stones knowing it was the wish of the cemetery company. These of course can be permanently removed as soon as the ventilator, perforated door and top trap doors are fixed. I have taken all measurements for same and shall within the next few days go into designs and prices to submit to you. It is my duty to inform you I was not able to employ the caretaker from the precincts of the vault the whole time. I was, however, able to send him on several errands and so I gained my objective partially. The vault too was very damp and these odours were offensive, due to the stale food and damp . . . . I hope I have acted as you wished me to. I can only assure you I have been to great trouble to carry out your instructions in a sacred way." The same employee wrote to the clerk of the defendants a letter dated March 11, 1925, in these terms : " March 11, 1925 : Dear Sir, re Hoskyns Memorial, Paignton Cemetery. Mrs. Hoskyns writes us wishing us to send a man out to Paignton Cemetery to burn incense and wave it whilst walking around the grave, also to pour liquids through the ventilators into the vault, also to burn candles round the grave. We shall be glad to know if your council will permit this and await to hear your early instructions." Permission was refused, but a week later Mr. Bevan, an architect, who had been instructed by the plaintiff on the subject of ventilation, was allowed to inspect the interior of the vault, and there were then found deposited therein the following articles : two wooden tables, a wooden screen,

two large flower pots with evergreen plants, a mat, seven brass candlesticks, a large bowl, a small mirror, five flower vases, scent bottles, a tin half full of camphor, two metal trays, a spirit lamp, a metal purse, four apostle spoons, a tumbler containing wine, a quarter bottle of port wine, a cup and saucer, a china plate, a small jug, a plate, two pennies and five florins, and to these were added at the plaintiff's request three bunches of violets, a bottle of Madeira wine, a bottle of oil of lavender, a bottle of oil of lemon, a bottle of essence of vanilla, and a pound tin of coffee. Throughout the years 1925 and 1926 the plaintiff was attempting by various means to gain access to the interior of the vault, and she was again in Paignton in December, 1925, and January, 1926. On January 19 she succeeded in evading the caretaker, and with some outside assistance opened and entered the vault. Therein she proceeded to light a methylated spirit lamp and several candles, to burn incense and to cook some meat. The interior of the vault was in great disorder, broken bottles and paper being strewn about, and for her own safety the police sergeant who had been summoned by the caretaker, unable to induce her to quit voluntarily, superintended her removal from the vault by the caretaker. Shortly afterwards the plaintiff obtained a licence from the Home Secretary for the removal of the body to another cemetery, and in connection with this proposal instructed certain undertakers. The defendants consented to the removal, and with a view thereto allowed access to the vault and the erection of a tent over it, but the plaintiff availed herself of these facilities for purposes more closely connected with the performance of the ceremonial rites, and the tent was removed and the Home Secretary's licence withdrawn when it was appreciated that the plaintiff had no real intention of acting upon it. Ultimately the proceedings in the cemetery became a matter of public notoriety, and the maintenance of good order and decorum was at times seriously disturbed. In December, 1926, shortly before the issue of the writ, the plaintiff was prevented in an attempt to enter the vault in order to deposit therein flowers, fruit, a cooked pigeon, wine, coffee, milk,

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fleur de lys, orris root, and aromatic gums and other deodorizers.

Thereupon the plaintiff brought the action. She alleged that the defendants had on divers occasions wrongfully prevented her from exercising her right of access to the vault, and she claimed a declaration of title and other relief on the footing that the property of the vault was in her, that she was entitled to visit, open and enter into the vault whenever she pleased for all reasonable purposes, including the purposes of repairing, cleaning and ventilating it and of performing the traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead and for other purposes, and that any regulation of the defendants contrary to this absolute right was ultra vires. There was no evidence that the vault was out of repair. In 1923 plaintiff retained Mr. Bevan for the avowed purpose of providing additional ventilation, but, after she had obtained the defendants' permission to execute the work, she would not allow the architect to proceed with it. In her statement of claim she asserted, and in an affidavit filed on an interlocutory application she swore, that both she and her mother were members of the Orthodox Greek Church, and that the rites were those of the Orthodox Greek Church, but in the witness box she said this was due to some mistake, and admitted that she is, and her mother was, a member of the Established Church of England, and that the latter was buried as such.

Eve J. dismissed the action.

The plaintiff appealed.

G. B. Hurst K.C. and *J. N. Gray* for the appellant. The learned counsel advanced the same arguments as in the Court below. The following cases were cited: *Spooner* v. *Brewster* (1); *Ashby* v. *Harris* (2); and *McGough* v. *Lancaster Burial Board.* (3)

(1) (1825) 3 Bing. 136. (2) (1868) L. R. 3 C. P. 523.
(3) 21 Q. B. D. 323.

Vaisey K.C. and *C. E. Harman*, for the respondents, were not called upon.

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SCRUTTON L.J. This is one of those unfortunate cases where an educated and sincere lady has formed views as to her duty to her dead which conflict with the ordinary habits of mankind, and she has, in consequence, indulged in a series of actions which have led the burial authority of the cemetery where her mother is buried to take action which probably they would not have dreamt of taking with persons who conduct themselves according to the ordinary beliefs of persons at the present time.

The lady's mother, who was a member of the Church of England, was buried in the consecrated portion of this cemetery belonging to the Paignton Urban District Council in 1915. Shortly after her mother's death the plaintiff bought the exclusive right of burial in four plots in that cemetery, and she obtained permission by payment to erect a vault in which her mother's body in a coffin was concreted round. There was a door into the vault and by the side of the concreted coffin there is a narrow passage. There would be room for further interment on the top of the concreted coffin. The lady, who says that she is a descendant of a family of old French nobility, has conceived the idea that it is her duty towards her dead mother to perform what she calls acts of piety, which include burning incense round the coffin, placing food, drink, and money upon it, and burning or placing various scented roots and liquids about and upon it. For some time it was not known exactly what she was doing when she opened the vault, as she did, and went into it; but after some five or six years what she was doing was brought to the attention of the cemetery authority, and there were then found in the vault a very miscellaneous collection of articles. Eve J. sets them out in his judgment. There were found in this very small vault "two wooden tables, one wooden screen, two large flower pots with plants (evergreens), one mat, seven brass candlesticks, one large bowl, one small mirror, five flower vases, scent bottles, a tin half full of camphor,

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two metal trays, one spirit lamp, one metal purse, four apostle spoons, one tumbler containing wine, a quarter bottle port wine, one cup and saucer, one china plate, one small jug, one plate, two pennies and five florins, and to these were added at the plaintiff's request three bunches of violets, one bottle of Madeira wine, one bottle of oil of lavender, one bottle of oil of lemon, one bottle of essence of vanilla, and a pound tin of coffee." In addition to the proceedings, in the course of which she had gradually collected these articles in the vault, the appellant, at times by herself or by her servants, burnt incense in and around the grave, and just before the writ was issued by her she went to the vault taking with her flowers, fruit, fleur de lys, which appears to be some kind of root of a plant, orris root, a cooked pigeon, a table, and wine and milk and coffee, and she was apparently prepared, or she desired, as what she calls an act of piety, to place these things on the tomb in the interior of the vault in celebration or honour of her dead mother's birthday. She was stopped from doing it by the respondents, whereupon she issued a writ against them in which she claims that she had a right to use the vault for all reasonable purposes, including the observance of the rites of the Orthodox Greek Church and the provision of better ventilation and for reparation. The difficulty of dealing with this very sincere lady is shown by the fact that she was quite ready, for the purpose of enabling herself to carry out these acts of piety, as she calls them, to swear quite falsely that she and her mother were members of the Orthodox Greek Church, which they have never been, both being members of the Church of England. A sincere lady, whose views of what is right and what is wrong can readily lead her to swear a thing which is quite untrue, may place any public authority in a position of great difficulty. The lady's rights, such as they are, depend on the statutory powers given to the Urban District Council, and those powers are that under the Public Health (Interments) Act, 1879, there are added to the powers given to urban district councils by the Public Health Act, 1875, the power to provide and maintain cemeteries, and in that Act the

Cemeteries Clauses Act, 1847, is incorporated. By s. 40 of that Act, "The company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell, either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart, or the right of one or more burials therein, and they may sell the right of placing any monument or gravestone in the cemetery, or any tablet or monumental inscription on the walls of any chapel . . . ." In the preceding Act, which did not apply to public authorities, the Burial Act, 1852, the powers have been rather more extensively worded, for they include the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period. Those words are omitted in the Cemeteries Clauses Act, 1847, which is incorporated in the Act under which the Paignton Urban District Council exercise their powers. I think it is quite clear that the right of the appellant is derived from a grant made under the authority of that statute, an exclusive right of burial in certain grave spaces together with a right on payment to construct a vault. I think it is quite clear that the grant of the exclusive right of burial does not confer any freehold interest in the land, and the payment for the erection of a vault does not confer any property in the vault erected in the land. It may be that if the materials are severed they could then become the property of the person who erected them, but the cemetery authority remain the owners and occupiers of the cemetery with the graves in it including the vaults in it. I do not think that the statute or the regulations contemplate a vault which is to be a place of habitation for the living, temporary or permanent; they contemplate a vault which is to be a place of burial for the dead with a right of giving to a living person the right of exclusive burial in that vault or burial place. The idea of the lady that she has a private place to which she may resort for what she calls acts of piety is, I think, a mistaken one and one which the cemetery authority is perfectly right in preventing her from exercising.

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That being the view which I take of the position, a view which seems to me entirely supported by the judgment of the Court of Appeal in *McGough* v. *Lancaster Burial Board* (1), it appears to me that the judgment of Eve J. was perfectly correct. He stated that the appellant's right was only to open the vault for the purposes of interments therein and of executing any necessary repairs thereto or with the written consent of the respondents. To that I shall add, without altering the wording of the declaration, that it must be obvious that the lady cannot open the vault without giving notice to the cemetery authority. The idea of each proprietor of a vault being at liberty to open a vault whenever he likes without communication with the cemetery authority appears to me to be quite contrary to the powers vested in the cemetery authority, whoever it may be, and with regard to any right to enter for the purpose of executing necessary repairs, I do not think the mere fact that the appellant says that repairs are necessary in the interior of the vault entitles her to open the vault. This lady, unfortunately, has a habit of saying things which are not true if she thinks she can effect her purpose thereby, and in my judgment, without prejudging other states of facts which may arise, the cemetery authority will be quite justified in saying that on the present facts there is no satisfactory evidence that any interior repairs are wanted in this vault. Exterior repairs are obvious by inspection, but from the nature of this vault it is difficult to see what interior repairs are wanted. There has been no evidence at present that any interior repairs have been necessary since 1920. Although the appellant, either in person or through her legal advisers, talks about ventilation, she was given permission to put more ventilators in the vault and, having got that permission, did not use it; and I can only suppose that this mention of repairs and ventilation is an excuse to enter the vault for the purpose of using it as a place of private habitation where she can perform what she calls acts of piety which, whatever she may think, were at least as common among savage races as among the early

(1) 21 Q. B. D. 323.

Christians whose habits she thinks she is following. The Assyrian kings surrounded themselves in burial with their dead wives, concubines, horses, slaves and food for the time when they should awake in the other world; the Red Indians do the same, and the lady must not delude herself with the idea that she is following merely the practices of the early Christians; she is following the practices, as Eve J. says, of a very large number of pagan tribes, and cemetery authorities are justified in a cemetery of the year 1928 in stopping the lady from following those extraordinary practices which are quite out of touch with the habits of modern civilization.

For these reasons, without going in detail into the evidence, which is a melancholy example of what a sincere but quite wrong-headed woman can do, I think the judgment of the learned judge should be affirmed and the appeal dismissed with costs.

GREER L.J. I agree. The appellant asks us to say that Eve J. was wrong in refusing her the injunction which she claimed. On p. 677 of the report of the judgment in the Law Reports the learned judge summarizes the claim that she was making before him in these words: "Apart then from the declaration of complete ownership of the vault, which I hold to be unsustainable, what is it that the plaintiff is claiming in this action? It is in substance an injunction to restrain the defendants from preventing her at her own pleasure opening and entering into and using the vault for —I am about to read para. B of the particulars of para. 4 of the statement of claim—'the purpose of the observance of the traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead and for the purposes of repairing and ventilating the said tomb.' The last two purposes can be disregarded, as no evidence has been produced that the vault has ever been out of repair, and so far as ventilation is concerned the defendants, as appears by the correspondence on pp. 8 to 11, granted permission in 1923 for the construction of additional ventilators in accordance with the proposals

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of Mr. John Bevan, an architect employed by the plaintiff. The plaintiff, however, would not allow Mr. Bevan to proceed with this work." Therefore it is quite clear that the lady was asking for the injunction in order that she might have free entry into the vault to do the kind of acts and perform the rites which have been described by Scrutton L.J. The fact that she might have a right of entry for some purposes would not entitle her to an injunction when the learned judge is satisfied that she does not want the injunction for the lawful purposes but wants it to enable her to do that which she is not entitled to do. I think it is perfectly clear that, whatever rights this lady bought when she bought the exclusive right of burial in the plots which are covered by the vault, she did not buy the right to carry on these services which she insisted she was entitled to carry on in the vault. That right was never conferred on her at all, and inasmuch as she was asking the learned judge for an injunction to enable her to go on performing those things which she had no right to do, she is not entitled to have the refusal of the injunction set aside because there may possibly be some lawful purpose which she may be entitled to exercise. The only remedy that the respondents have, and the only means they have of preventing her from doing what she is not entitled to do, is to exclude her altogether from the interior of the vault. They had allowed her to go in for the purpose of measuring the tomb and for the purpose of seeing about ventilation, and then it was found that she really did not use the permission granted for the purposes for which she asked for it, but for the purposes for which she was not entitled to use it. The only way in which the learned judge could deal with the claim was to refuse the injunction which was asked for.

A great many points have been made in the course of Mr. Hurst's interesting argument which it does not seem necessary to enter into. I have myself a very grave doubt whether any right is conferred in cemeteries which are governed merely by the Cemeteries Clauses Act, 1847, to do anything more than to bury from time to time those whom the person having been given the right desires to have buried in the vault.

The right to put flowers on the grave, to plant things upon the grave, is not a right in the strict sense of the word, but the kind of thing which the Legislature trusts any sensible governing body will allow. I have no doubt whatever that the right that was sold in this case, as in many other cases, to erect a monument does include a right from time to time when the monument gets out of repair, whether it is a vault or a gravestone, to go there and put it in repair. For my part I cannot find in the statute any power to grant any other right except those which are included in the grant, an exclusive right of burial and a right to erect a tombstone including therein a right from time to time to see to the repair of the tombstone. Be that as it may, no construction of the statute can possibly confer upon the person described as the owner of the grave in these rules the right to do what this lady has claimed she is entitled to do, and what she will do if any permission is granted to her to enter this vault, because she unfortunately regards it as a religious duty to do the things which the cemetery authority, the Court below, and this Court entirely disapprove as proper things to be done in that vault or grave. I do not think it is necessary to refer to the cases which have been cited except to say that in my judgment *McGough's* case (1) in the Court of Appeal decides that the rights of a grave owner are confined to those two rights I have mentioned, the right to bury and the right to erect a tombstone. If that is so, of course that finally decides this case. It seems to me unnecessary to go so far as that in this case, because the learned judge was clearly right in refusing the injunction that was claimed, and he has left open to the appellant the right of going to the grave for repairs when the authority is satisfied that she really wants to go there for the exercise of that right.

For these reasons I agree that the appeal should be dismissed.

SANKEY L.J. I agree. I wish particularly to confine my judgment to the question of the rights of this lady at a cemetery of this sort. I am not discussing any question of a churchyard. The rights she has are rights which arise either expressly

(1) 21 Q. B. D. 323.

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or impliedly under the contract that she has with the respondents, rights that, by the powers conferred on the respondents by the Act of Parliament, they may grant to her —namely, the exclusive right of burial in certain grave spaces, to hold the same for purposes of burial subject to the regulations which are now in force or which may hereafter be issued by the respondents. The Act of Parliament under which the respondents derive their authority, the Cemetery Clauses Act incorporated in the Public Health Act, 1879, provides by s. 40 that " The company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell, either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart, or the right of one or more burials therein, and they may sell the right of placing any monument or gravestone in the cemetery " ; I need not read the other immaterial words. Under the rather different words of the Burial Act, 1852, *McGough* v. *Lancaster Burial Board* (1) was decided. Lord Esher M.R. there said (2) : " It seems to me that he"—the plaintiff in that case—" had no legal right granted to him to do anything more than to bury his dead in that place, and to put up a gravestone, and that he had no right given him to put up any other structure in addition thereto." It is to be observed that the right is a statutory right and, as Bowen L.J. said in the same case (3) : " The right to be given under s. 33 is a statutory right and the matter appears to me to be only complicated by considering whether it can be called a freehold or not. The board may sell an exclusive right of burial, subject to such restrictions as they think proper." It sounds perhaps rather a commercial way of putting it, especially in a case of this character, but the real question here is, what rights did the appellant acquire ? It cannot in my view be said that she acquired any right of property in the cemetery. She had merely an exclusive right of burial, subject to the rules and regulations laid down by

(1) 21 Q. B. D. 323. (2) 21 Q. B. D. 326.
(3) 21 Q. B. D. 328.

the respondents. I cannot think she had any of the rights which she seeks to enforce in the present action and which have been referred to by the learned judge in the Court below, the rights of conducting ceremonies of the sort indicated within the interior of the vault itself. I rather think the Legislature has purposely left a good many matters open to the reasonable good sense of the authorities. Perhaps it is not possible, in a case where conscience claims to hold undisputed sway, to appeal to reason, but in justice to the respondents here it cannot be said, in my view, that they in any way desire by what they have done or by the regulations they have made to prevent people showing a due respect to their dead. I should not like to say anything against those time-honoured customs which are observed on any day in any churchyard or in any cemetery in any town or village in England. It is obvious by regulation 14 that the public has access to the cemetery. There is nothing to prevent them having access to a grave or to a vault; I do not mean the inside of a vault, I mean at a vault or at a grave; and as I read regulation 10 there is nothing to prevent the public placing flowers on a grave or at a vault as distinguished from in a vault. Regulation 10 merely says: "No shrubs or flowers are to be planted over graves without permission first obtained." That is a part of the contract. There is a certain fee which is mentioned in the last page of the regulations which the respondents are entitled to for granting permission. It seems to me that it is impossible to uphold the claim of the appellant to perform any of the rites which she claims to perform inside the vault over the remains of her deceased mother. I think the learned judge came to the right conclusion, and I am quite satisfied we are not doing anything in upholding the judgment which will in any way prevent the due observance of people's respect to their dead.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard.*

Solicitors for respondents: *Torr & Co., for Eastley & Co., Paignton.*

W. H. G.

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[1927. G. 1428.]

Sewers—Connecting Pipe—Sewer in Public Road—Soil of Road in Private Ownership—Premises abutting on Road—Right to connect Drain through Subsoil—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 18—*Wimbledon Corporation Act*, 1914 (4 & 5 *Geo.* 5, *c. clxiv.*), *s.* 84.

The plaintiff and defendant were the owners of adjoining properties in Wimbledon.

Subject to the rights of the Wimbledon Corporation as highway and sewer authority the plaintiff owned the soil of a public road not repairable by the inhabitants at large with a Corporation sewer therein.

The defendant's property abutted on this road, as well as on another sewered road, and he was entitled under s. 21 of the Public Health Act, 1875, to cause his drains to empty into the Corporation sewers on giving proper notice and complying with their regulations.

At the defendant's request and acting under s. 84 of the Wimbledon Corporation Act, 1914 (which section is a little wider than s. 18 of the Public Health Acts Amendment Act, 1890), the Corporation connected the defendant's combined drain (already approved by them for draining the defendant's houses in combination under s. 81) with the sewer in the plaintiff's road, carrying the connecting pipe through a small portion of the plaintiff's subsoil.

The plaintiff sued the defendant for damages for trespass on his subsoil.

Astbury J. held that the Corporation's acts were fully justified by s. 84 of the Wimbledon Act, even if not by the Public Health Acts, and that whatever right for compensation the plaintiff might have against the Corporation for damage sustained by reason of the exercise of their statutory powers, he had no cause of action against the defendant for requesting the Corporation to exercise those powers.

On appeal:—

Held, that whether or not the Corporation in exercising their statutory powers committed a trespass on the plaintiff's subsoil, the plaintiff had entirely failed to prove that the defendant had committed a trespass on that subsoil. The Corporation in making the connection did so as the public authority and not as agents for the defendant.

Decision of Astbury J. [1928] Ch. 902 affirmed.

Appeal from the decision of Astbury J. (1)

By a conveyance on sale dated September 28, 1905, certain land in Wimbledon was conveyed to the plaintiff. This land lay to the south of Cottenham Park Road and included a strip of land running east to Durham Road. This

(1) [1928] Ch. 902.

strip had a local board sewer underneath. The plaintiff subsequently laid out a street known as Melbury Gardens along this strip. For many years this street had now been a public highway with the public sewer thereunder. In 1926 the Wimbledon Corporation decided to take the road over and made it up at the cost of the frontagers, but it was not formally declared a public road repairable by the inhabitants at large under s. 152 of the Public Health Act, 1875, until June 9, 1927. Subject to the rights of the Wimbledon Corporation as sewer authority and road authority the soil of the road remained vested in the plaintiff.

By a conveyance on sale dated March 21, 1927, land adjoining that of the plaintiff was conveyed to the defendant. The land so conveyed abutted on the south side of the road Melbury Gardens and on the west side of Durham Road, which was also sewered.

The defendant proposed to erect seventeen houses on his land and deposited plans showing a system of drainage by one combined drain.

On April 23, 1927, the Wimbledon Corporation in pursuance of their powers under the Wimbledon Corporation Act, 1914, s. 81 (1), sanctioned this system and declared that for the

(1) The Wimbledon Corporation Act, 1914, provides as follows:—

Sect. 81, sub-s. 1: "If it appears to the Corporation that two or more houses may be drained more economically or advantageously in combination than separately and a sewer of sufficient size already exists or is about to be constructed within 100 feet of any part of the premises the Corporation may when the drains of such houses are first laid order that such houses be drained by a combined drain to be constructed either by the Corporation if they so decide or by the owners in such manner as the Corporation shall direct and the costs and expenses of such combined drain and the repair and maintenance thereof shall be apportioned between the owners of such houses in such manner as the Corporation shall determine and if such drain is constructed by the Corporation such costs and expenses may be recovered by the Corporation from such owners."

Sub-s. 2: "Any combined drain constructed in pursuance of this section shall for the purposes of the Public Health Acts be deemed to be a drain and not a sewer."

Sub-s. 3: "Provided that the Corporation shall not exercise the powers conferred by this section in respect of any house plans for the drainage of which shall have been previously approved by the Corporation."

Sect. 83: "The Corporation may on the application and at the expense of any person owning or occupying

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purposes of the Public Health Acts the combined drain should be deemed to be a drain and not a sewer. The defendant then erected the seventeen houses, and in April, 1927, on his request and at his expense the Wimbledon Corporation connected the combined drain with the sewer under s. 84.

On June 29, 1927, the plaintiff commenced this action, alleging that the defendant had broken a certain restrictive covenant as to the cost of the houses erected, and claiming a mandatory injunction and damages. He also claimed damages for trespass on his subsoil in Melbury Gardens by connecting the combined drain with the sewer.

Astbury J. held (1.) that even if the plaintiff had been entitled to enforce the covenant in question against the defendant, which, failing allegation and proof of a building scheme at that date, he could not do, the defendant had not in fact broken it; and (2.) that the Corporation's acts were fully justified by s. 84 of the Wimbledon Act, even if not by the Public Health Acts, and that whatever right to compensation the plaintiff might have against the Corporation for damage sustained by reason of the exercise of their statutory powers, he had no cause of action against the defendant for requesting the Corporation to exercise those powers.

The plaintiff appealed from so much of the decision of Astbury J. as related to the alleged trespass to his subsoil. The appeal was heard on December 14, 1928.

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premises abutting or fronting on any street not repairable by the inhabitants at large wherein a sewer has been laid lay down take up alter relay or renew in across or along such street such drains as may be requisite or proper for connecting such premises with the sewer doing as little damage as may be in the execution of the powers hereby granted and making compensation for any damage which may be done in the execution of such powers such compensation to be ascertained by and recovered before a court of summary jurisdiction."

Sect. 84: "If the owner or occupier of any premises desires that the sewer or drain from such premises shall be made to communicate with any sewer of the Corporation such communication shall be made by the Corporation upon the cost or estimated cost of making the communication being paid to the Corporation or the payment thereof to them being secured to their satisfaction and the Corporation may execute all works necessary for that purpose."

Naldrett K.C. and *G. D. Johnston* for the appellant. The only question which arises on this appeal is with reference to the trespass by the defendant to the plaintiff's subsoil. It is submitted: (1.) that the defendant had no right to traverse the soil of the plaintiff for the purpose of connecting his drain with the Corporation's sewer, and (2.) that the Corporation had no right to make the connection either (*a*) as the road authority or (*b*) as the sanitary authority.

[LORD HANWORTH M.R. You have first to establish that the defendant was responsible for what the Corporation did.]

With regard to the powers of a local authority as a highway authority, s. 4 of the Public Health Act, 1875, defines a street as including "any highway . . . . and any road lane footway square court alley or passage whether a thoroughfare or not." Sect. 150 empowers the local authority to compel the paving, sewering, etc., of private streets. Sect. 152 gives power to the local authority to declare private streets when sewered, etc., to be highways. The effect of such a declaration is to let in s. 149, which shows the extent to which the soil of a street is vested in the local authority. The local authority have power over the surface of the street, but the subsoil remains vested in the original owner. Here at the time the street was opened up it had not become a highway repairable by the inhabitants at large.

In *Goodson* v. *Richardson* (1), where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law. The facts that the soil under the highway was of no value to the owner and that his motive for applying to the Court was not connected with the enjoyment of his land, were held not to be reasons against granting the injunction. In *Tunbridge Wells Corporation* v. *Baird* (2) it was held that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them within the meaning

(1) (1874) L. R. 9 Ch. 221. (2) [1896] A. C. 434.

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of the Public Health Act, 1875. See also *Rolls* v. *Vestry of St. George the Martyr, Southwark* (1); *Coverdale* v. *Charlton*. (2)

[LORD HANWORTH M.R. What troubles me is this: Where a person sets in motion the local authority is he liable for any trespass they may commit?]

Sect. 84 of the local Act only deals with the communication with the sewer, and entitles the owner of the drain to call upon the Corporation to make the connection.

[LORD HANWORTH M.R. The Corporation are not the employees of the defendant.]

They are his agents for the purpose of making the connection.

[LORD HANWORTH M.R. Until you make out that the relation between the defendant and the Corporation was that of principal and agent you have no case. I see no suggestion of agency in s. 18 of the Public Health Act, 1875.]

In *Wood* v. *Ealing Tenants, Ld.* (3) the action was brought by the owner of the soil of a passage beneath which ran a sewer against the defendant, who had connected his drain with the sewer. The actual connection had been made by the local authority. The case shows that the local authority were there acting as agents for one of the parties.

[LAWRENCE L.J. There was there no formal request to the local authority under s. 21 of the Act of 1875.]

Further, the defendant ratified and adopted the acts of the Corporation, and is therefore liable for their trespass: *Carter* v. *Vestry of St. Mary Abbots, Kensington*. (4)

[LAWRENCE L.J. I do not see how the defendant could have interfered in the slightest way with the execution by the Corporation of their statutory duties.]

Archer K.C. and *R. C. Maxwell* (*Randolph Glen* with them) for the respondent were not called upon to argue.

LORD HANWORTH M.R. This appeal fails in limine. The action tried before Astbury J. was brought with regard to several matters which are not however the subjects of this

(1) (1880) 14 Ch. D. 785, 796.
(2) (1878) 4 Q. B. D. 104, 121.
(3) [1907] 2 K. B. 390.
(4) (1900) 64 J. P. 548.

appeal. The only question decided in the action from which this is an appeal was whether the plaintiff was entitled to recover damages from the defendant for trespass to the subsoil of a road the ownership of the soil of which was vested in the plaintiff.

The plaintiff is the owner of certain property in Wimbledon under a conveyance dated September 28, 1905, underneath a strip of which was a sewer laid down by the then local board. The plaintiff after he had purchased the property laid out a road known as Melbury Gardens along this strip of his land.

On March 21, 1927, the land on the south side of Melbury Gardens was conveyed to the defendant. The sewer in Melbury Gardens was used for the drainage of the houses abutting on Melbury Gardens. On the south the defendant built seventeen houses which were detached, but all in a row.

On April 6, 1927, the Wimbledon Corporation made an order that these seventeen houses built by the defendant should be drained by a combined drain and that the drain should be deemed to be a drain and not a sewer. In consequence of that order the combined drainage scheme was carried out by the defendant.

On April 23, 1927, on the request of the defendant and at his expense, the Corporation connected the combined drain with the sewer in the road called Melbury Gardens, the subsoil of which belonged to the plaintiff.

For many years after the plaintiff laid out that road it was a public highway with the sewer under it, but in 1926 the Corporation decided to take the road over, though it was not formally declared a public road repairable by the inhabitants at large under s. 152 of the Public Health Act, 1875, until June 9, 1927.

On June 29, 1927, the plaintiff commenced this action.

Now what is said by the plaintiff is this: "You have connected your drain with the sewer, but in so doing you have trespassed on my subsoil. You had no right to do that, and the connection is a standing trespass to my subsoil." The defendant's answer is: "I did not do it; I never

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committed any trespass; what was done was done by the Corporation." The plaintiff's reply to that is that although the Corporation did the actual work, they did it at the request of and as agents for the defendant.

It seems to me that a very curious question is raised by that—namely, whether the defendant can be made responsible for work which he did not do, and which was done by the Corporation under their powers as the local authority. The first question therefore is, how came this connection to be put in? Our attention has been called to several sections of certain Acts. By s. 21 of the Public Health Act, 1875, power is given to owners of property to cause their drains to empty into a sewer controlled by a local authority upon complying with certain requirements. Therefore supposing a sewer ran in land contiguous to that of the defendant, he could after giving notice, and complying with certain regulations, cause his drains from these seventeen houses to run into the local authority's sewer. It is further provided by s. 18, sub-s. 1, of the Public Health Acts Amendment Act, 1890, that: "Where the owner or occupier of any premises is entitled to cause any sewer or drain from those premises to communicate with any sewer of the local authority, the local authority shall, if requested to do so by such owner or occupier, and upon the cost thereof being paid in advance to the local authority, themselves make the communication and execute all works necessary for that purpose." Whereas, therefore, under the Act of 1875 a right had been given to an owner to connect up with the sewer of the local authority, now under this section of the Act of 1890 power has been given to local authorities to do the work themselves, and it is laid down that the local authority "shall"—not "may"—if requested to do so, themselves make the necessary or desired connection. Then we come to s. 81 of the Wimbledon Corporation Act, 1914. That was a section intended to secure the advantage of a combined drainage system, and under that section the order for the carrying out the necessary work was made. [His Lordship read s. 81 and continued:] Then there is s. 83, which provides that the Corporation may

on the application and at the expense of any person owning or occupying premises abutting or fronting on any street not repairable by the inhabitants at large, wherein a sewer has been laid, lay down take up alter relay or renew in across or along such street such drains as may be requisite or proper for connecting such premises with the sewer, doing as little damage as may be, and then there is a provision for compensation for any damage done. Finally there is s. 84, which I need not read, as it is practically a replica of s. 18 of the Act of 1890.

The defendant made a request to the Corporation under s. 83 to make the desired connection, and he was of course to be responsible for the cost of the work. The work was done, the expenditure came to a considerable sum, but I believe the defendant has paid that sum to the Corporation. The plaintiff, in bringing this action, says to the defendant: "You set the Corporation in motion; you insisted that this connection should be made, you also paid the cost of it, and therefore you are directly responsible for this trespass to my subsoil; you ordered it and you are all the more responsible because you have actually paid for it." In my opinion the plaintiff's case so stated breaks down, and if it breaks down then there is, I think, no connection between the defendant and the admitted trespass. I think it is certainly clearly established by *Goodson* v. *Richardson* (1) that the plaintiff can in respect of his rights in the soil of this road, though they are not unlimited, because the upper surface is dedicated to the public, prevent any person interfering with the soil by laying pipes in it: see per Lord Selborne. (2) Lord Halsbury says what is practically the same thing in *Tunbridge Wells Corporation* v. *Baird*. (3)

But the real question here is: has the plaintiff established the liability of the defendant for what has been done? In my opinion the defendant was quite within his rights in verbally requesting the Corporation to do this work, acting either under s. 18 of the Act of 1890, or under s. 84 of the

(1) L. R. 9 Ch. 221. (2) L. R. 9 Ch. 223.
(3) [1896] A. C. 434, 438.

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Wimbledon Corporation Act, 1914. What in fact did the defendant do? He said to the Corporation: "Make this connection." They said: "Yes, if you pay us," and he did pay them. Upon that it cannot, in my opinion, be said that he committed any trespass. I think that what he did was to say to the Corporation: "You know what your statutory powers are. I want you to make this connection. I want you to do what is necessary in order to make the connection in a proper way." I myself am unable to see that he ordered the Corporation to do anything wrong, or that he ordered them to take any violent or illegal steps in order to make the connection. All he did was to say to them: "If you will make this connection I will repay you your outlay." Really it all comes to this—that the defendant asked the Corporation to do things which it was their business to do, and which they had power to do under the Acts to which I have referred.

Then it is argued that even if the defendant had done nothing more than ask the Corporation to do the work, yet, as he had adopted their acts, he had thereby ratified them and could not escape liability for the trespass. In my view that contention breaks down. The Corporation clearly acted under s. 18 of the Act of 1890, or possibly under s. 84 of their local Act, but in either case it was the Corporation which did the work and who are responsible for it. Sect. 18 expressly says that the local authority themselves shall make the connection, and the whole tenour of the section makes it clear that the Corporation, although entitled to be recouped their outlay, do the work themselves only, as the local authority responsible for the health of their district, and not in such a way as to make them the servants of the defendant, or his agents, or so as to enable any one to make him responsible on the ground that he has ratified their action. I think the defendant is in no way responsible, and the fact that there may have been some trespass to the subsoil of the plaintiff's land does not involve the defendant in any responsibility for acts not done by him, but done by the Corporation under their statutory powers. In my judgment the appeal fails

inasmuch as the defendant has not been shown to be answerable in any way for any trespass committed.

LAWRENCE L.J. I agree that this appeal fails. The plaintiff claims damages for trespass to the subsoil of his land. Like the learned judge in the Court below, I entirely fail to see how the plaintiff can have sustained a farthing's worth of damages. But apart from the question of damages, I am of opinion that the appeal fails on the ground that the plaintiff has not succeeded in showing that there has been any trespass on the part of the defendant.

The Wimbledon Corporation under s. 81 of its local Act of 1914 made an order on the defendant for a combined drainage scheme for the seventeen houses then recently erected by him in Melbury Gardens, and directed the manner in which such drainage should be carried out on his land. The defendant, having no option, obeyed, and, having constructed the drain on his own land in accordance with such order, applied to the Corporation to make the necessary connection with the Corporation's sewer in Melbury Gardens. The Corporation had not at that time actually taken over Melbury Gardens, which was then a street not repairable by the inhabitants at large. Under s. 83 of the Act of 1914 it would appear that the Corporation had ample power to lay down the connecting link between the defendant's drain and the sewer in order to make the necessary connection with that sewer, and, if in exercising its powers, it had done any damage to the plaintiff's land, the plaintiff would presumably have had a claim for compensation against the Corporation under that section. Having regard to the fact that at the date of the alleged trespass the Corporation was making up the road with a view to its being taken over, I am not surprised that the Corporation never thought that the plaintiff could have any claim for compensation and therefore did not ask the defendant for an indemnity. If, contrary to my opinion, the Corporation has exceeded its statutory powers in connecting the defendant's drain with the sewer it may have committed a technical trespass. But even so, that

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does not prove that any trespass was committed by the defendant. The Corporation has the responsibility and duty of seeing that there is a proper drainage system in its district, and under the general Act of 1890 and the local Act of 1914 it had the power, and (on the application of the defendant) the duty to make this connection. The Corporation was not the agent of the defendant to make the connection, and the defendant, when once he had set the Corporation in motion, had no power to control its actions or to say in what manner or under what powers the connection should be made. I abstain from saying anything further about the powers and rights of the Corporation, because it is not a party to this action and possibly there may be further litigation between it and the plaintiff. It is enough for the purpose of this appeal to say that the plaintiff has entirely failed to prove that the defendant has committed any trespass upon the subsoil of Melbury Gardens.

RUSSELL L.J. The only cause of action with which we are concerned is trespass, and it is admitted that the defendant himself never committed any trespass at all. All he did was to request the local authority to exercise their powers and connect up these drains. That the local authority have power to do so is clear under the Act of 1890 and their own Act of 1914. One or other Act gives them the power, and it seems to me that it is not necessary to go very closely into those powers. It is said that in exercising them the local authority have committed a trespass. But the defendant never asked them to commit a trespass. All he asked them to do was to make the connection. He could not control their actions. If they committed any trespass, and I am not at all sure that they did, they did not do so at the instance of the defendant. I think the claim fails.

Appeal dismissed.

Solicitors for appellant: *Vivash Robinson & Co.*
Solicitors for respondent: *Taylor, Willcocks & Co.*

W. I. C.

VERNER-JEFFREYS *v.* PINTO.

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1928
CLAUSON J.
June 29; *July* 3.
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Dec. 7, 10, 19.

[1928. V. 120.]

Money-lender—Employment of Agent or Canvasser to invite any Person to borrow Money—Canvassing without Authority of Money-lender—Introduction of Customer by Canvasser to Money-lender—Loan by Money-lender with Knowledge of Introduction—Legality of Money-lending Transaction—Rate of Interest 48 per cent. on Loan secured by Bill of Sale—Harsh and unconscionable Transaction—Reopening of Money-lending Transaction—Moneylenders Act, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 5, *sub-ss.* 3, 6; *ss.* 10, 12—*Moneylenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

By s. 5, sub-s. 3, of the Moneylenders Act, 1927, it is enacted: "No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money." Sub-s. 6 of the same section: "Where it is shown that a moneylending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance":—

Held, by the Court of Appeal (Lawrence and Russell L.JJ.; Lord Hanworth M.R. dissenting), that the words "no person shall act as such agent or canvasser" must be construed as meaning "no person shall act as an agent or canvasser employed by a moneylender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender." The Act does not, therefore, prohibit canvassing or touting for this purpose, where the canvasser acts without the authority or mandate of the money-lender to whom he is introducing a customer.

Decision of Clauson J. on this point reversed.

Although a rate of interest on a loan not exceeding 48 per cent. does not carry the legal presumption introduced by s. 10 of the Act that the transaction is harsh and unconscionable; yet, where in addition to his contract for repayment of the loan the borrower gives a bill of sale over his furniture of ample security for such repayment, a rate of 48 per cent. is, in such circumstances, so excessive as to render the transaction harsh and unconscionable for the purposes of s. 1 of the Moneylenders Act, 1900.

So held by Clauson J.

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WITNESS ACTION.

The facts appearing from the evidence taken at the trial are as follows :—

The plaintiff, Mrs. Verner-Jeffreys, was a widow in the receipt of a substantial income ; but, being in need of a sum of about 500*l.*, although she had on some previous occasion been warned against dealings with bills of sale or money-lenders, she was introduced in the month of December, 1927, to a firm of money-lenders, Clive Everton, Ld., whose manager was Mr. Harwood. Harwood visited the plaintiff's house in Devonshire and took an inventory of her furniture. From the correspondence which took place between her and Mr. Harwood it appeared that she hoped to obtain a loan of 500*l.*, to be repaid at the rate of 30*l.* or 40*l.* a month, and that she was willing to give security for the loan upon her furniture. Harwood in December, 1927, advanced the plaintiff 150*l.* on her promissory note for 250*l.*, and about December 20, 1927, he made her a further advance of 60*l.*, taking her promissory note for 400*l.* in lieu of her former note for 250*l.* ; so that the total amount of the loan was 210*l.*, for which she had signed her promissory note for 400*l.* She, however, wanted 500*l.*, and on January 9, 1928, came to London and went to the office in Bond Street of the firm of which Mr. Harwood was the manager for the purpose of obtaining a further advance. Mr. Harwood told her he was not in a position to make it, but that he had a friend who would do the business, and with that object he induced her to copy and sign a draft letter addressed to the firm of Clive Everton, Ld., as from her home in Devonshire in the following terms : " Dear Sirs, Will you kindly introduce me to some person or money-lenders so that I may obtain an advance to enable me to pay you off the money I owe you, as I understand you are not prepared to let the matter stand over." The lady was then taken by a clerk of Harwood to the office of a solicitor, who stated in the witness box that the transaction was one of which he knew nothing until he met the plaintiff on that occasion. At the request of the solicitor, the plaintiff signed a retainer in which she agreed

to pay him "the sum of 20 guineas for fees and out-of-pocket expenses, on his undertaking to carry through on my behalf the drawing and registration of a bill of sale made by me in favour of Mr. Pinto and the necessary documents in connection therewith." By the time when the plaintiff reached the solicitor's office there had been communications by telephone between Harwood and the defendant Pinto (who was his brother), and it was established by the evidence given at the trial that Mr. Harwood had in the course of their communications arranged with Pinto that Pinto should make the advance to the plaintiff and take from her a bill of sale as security, with the result that Pinto was (as the judge held) in effect presented to the plaintiff by Harwood as a person from whom she could obtain an advance of 500*l.* It was not possible to complete the transaction that afternoon, as copies of the inventory had to be inserted in the bill of sale and memorandum of contract and statutory declaration, and the matter was adjourned to the following day. On January 10 the plaintiff and the solicitor and Pinto met at Pinto's office in Hammersmith. A commissioner was at hand before whom the plaintiff made a declaration that she had not charged the furniture which was the subject-matter of the bill of sale. Mr. Harwood, according to the evidence of the defendant's witnesses, was in the passage outside the office. At that meeting the plaintiff signed a memorandum of contract, as required by s. 6 of the Money-lenders Act, 1927, whereby it was agreed between her and Mr. Pinto that the proposed advance of 500*l.* should be made that day to her with interest at the rate of 48 per cent. upon the security of a bill of sale, the loan to be repaid by eleven consecutive monthly instalments of 40*l.*, the whole of the balance remaining due to be paid on February 10, 1929. She also executed a bill of sale on her furniture and effects to secure the same advance of 500*l.* and interest thereon at the same rate of 48 per cent., the loan to be repaid by the same instalments. Mr. Pinto thereupon paid to the plaintiff 500*l.* in five 100*l.* notes, out of which she paid 21*l.* to the solicitor, and accordingly the plaintiff was left with a balance

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of 479*l.* She then left Mr. Pinto's office and returned with Mr. Harwood to the office of his firm. There was some conflict of evidence as to what then occurred there.

According to the plaintiff's evidence she paid off the promissory note of 400*l.*, receiving a discount of 40*l.* only, the result of which would have been that she would have paid 360*l.* back in respect of an advance of 210*l.*, 150*l.* of which she had had for one month and 60*l.* of which she had had for about three weeks: on the other hand, according to Mr. Harwood's evidence, which was supported to some extent by a receipt which was put in evidence, the plaintiff was allowed a discount of 100*l.* and only paid 300*l.* in respect of the 210*l.* which had been advanced to her. Whichever account was the true one, the plaintiff paid very heavily for the loan she had from Harwood.

The plaintiff brought this action against Mr. Pinto, in which she claimed a declaration that the whole transaction, including the bill of sale of January 8, 1928, was illegal and void, and for an order that the bill of sale might be cancelled: in the alternative, a declaration that the interest charged in the bill was excessive and that the transaction was harsh and unconscionable, and further that a fair rate of interest might be determined and the bill amended accordingly.

There was a counterclaim by the defendant for payment by the plaintiff of the instalments of the 500*l.* then due under the plaintiff's covenant in the bill of sale with interest.

The action came on for hearing before Clauson J. on June 29, 1928.

Frank G. Enness for the plaintiff. The loan was brought about by contravention of sub-s. 3 of s. 5 of the Moneylenders Act, 1927. The inference to be drawn from the facts proved is that Harwood was acting as agent for Pinto to invite the plaintiff to borrow the money. The documents requisite to carry out the transaction were in the solicitor's hands on January 9, when the plaintiff was introduced into his office. The evidence establishes a pre-concerted arrangement between Pinto, Harwood and the solicitor. Harwood delayed

the loan until the plaintiff became desperately anxious to obtain it; and then said that not he but Pinto would lend the money. There was a contravention of sub-s. 3 on the part of Harwood, of which full advantage was taken by Pinto, the whole transaction being thereby rendered illegal and void. There was a contravention of the Act, even if Harwood was acting without any authority of Pinto: sub-s. 3 of s. 5 is capable of bearing that construction. Pinto adopted and took advantage of Harwood's introduction to him of the plaintiff; and was therefore an agent or canvasser acting in a transaction within the terms of the section. As regards the alternative claim: although the rate of interest charged did not exceed 48 per cent., yet, having regard to the bill of sale, which was ample security for the loan, 48 per cent., the actual rate of interest charged, became, in the circumstances, excessive, and made the transaction harsh and unconscionable. The Court has power to reopen the transaction and to revise the security under s. 1 of the Money-lenders Act, 1900, a power preserved by a proviso at the end of s. 10 of the Act of 1927, even where the rate of interest does not exceed 48 per cent.

Edward Clayton K.C. and *H. J. Wallington* for the defendant. Upon the proper construction of sub-s. 3 the words "such agent or canvasser" mean an agent or canvasser employed by a money-lender to invite a person to borrow money. If that sub-section is open to the construction which the plaintiff seeks to place upon it, which made it unlawful for Harwood to act as canvasser although he was not employed for that purpose, the preceding sub-s. 1 is rendered unnecessary, as it would be covered by sub-s. 3. But if, upon its true construction, sub-s. 3 prohibits a person from acting as agent or canvasser when so employed by a money-lender, the provisions of sub-s. 1 are rendered sensible and there is no overlapping. Here the rate of 48 per cent. was not so excessive as by itself to make the transaction harsh and unconscionable without evidence of additional facts to prove that. The risks which a money-lender has to take must always be taken into account.

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CLAUSON J. This is an action which raises an important point under the Moneylenders Act of 1927, an Act which came into force on January 1, 1928. The transactions which I am about to state commenced under the old law and were completed under the new law. [His Lordship then stated the facts as above set forth and continued :] There are two points which I have to consider in this action. The first point is this : it is suggested on behalf of the plaintiff that the whole transaction is illegal under sub-s. 6 of s. 5 of the Moneylenders Act by reason of the fact that there has been a contravention of sub-s. 3 of s. 5 of the Act. Sub-s. 3 of s. 5 of the Act is not easy to construe, and if the construction which I am asked to place upon it is accurate, it is obvious that the section will operate very seriously in regard to money-lending transactions.

Sub-s. 3 of s. 5 is in these terms : "No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender—" I pause there to say that it was suggested on behalf of the plaintiff that I ought to come to the conclusion that Pinto, the defendant, had employed Harwood (who happened to be his brother) as an agent or canvasser for the purpose of inviting the plaintiff to borrow money from Pinto. On the balance of evidence, I am not prepared to hold that. While I suspect that there was more connection between the various parties than appears on the surface, on the weight of evidence I am not prepared to hold that the arrangements come to on January 9 had been previously planned between Pinto and Harwood. Accordingly, so far as that part of the section is concerned the plaintiff has not established any contravention of the section.

The sub-section goes on in this way : "—and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person

desiring to borrow money." The suggestion on behalf of the defendant, Mr. Pinto, is this, that the words "no person shall act as such agent or canvasser" mean that no person who is in the employment of a money-lender or is acting on behalf of a money-lender shall act as an agent or canvasser for the purpose of inviting a person to borrow money; in other words, that what is forbidden by this part of the section is a person acting as a canvasser under the authority of a money-lender. I do not so read the section. I read "such" as referring back to the words which explain "agent or canvasser," and I read this sub-section in this way: "no person shall act as agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender"; in my opinion it is forbidden by the section for a man to act as, what is popularly termed, a tout, even though he is acting without the authority of the money-lender to whom he is introducing or going to introduce the customer, and he will accordingly contravene the section if he acts as a tout, although he has no master employing him at the time.

It may be said this is hard on the money-lender, because a contravention of this sub-section makes, by reason of sub-s. 6, the whole transaction illegal, and penalizes the money-lender merely because a tout has intervened. But it will be observed on reference to sub-s. 6 that the money-lender is not penalized in any way if he can prove that the contravention occurred without his consent or connivance. If when the money-lender advances the money he knows that the customer has been procured by a tout and nevertheless is prepared to go on with the transaction and lend the money, I do not think that he is much to be pitied; he has entered into an illegal transaction.

Now assuming the construction which I have indicated of this sub-section to be a correct one, what are the facts here? There is no real dispute that the plaintiff was invited by Mr. Harwood to borrow money from Pinto. It was rather suggested that she seduced Mr. Harwood into

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introducing her to Pinto. As I understand the position, she asked for a loan, and she asked Mr. Harwood to get it for her; but it was Mr. Harwood, as I understand it, who in her presence rang up Pinto, and, having found that Pinto would do the business, proceeded to put the lady in communication with Pinto through the solicitor who was provided as her solicitor for the purpose: and it appears to me to be quite clear that Mr. Harwood acted as a canvasser for the purpose of inviting the plaintiff to borrow money from Mr. Pinto, the money-lender. Construing the section as I do, it appears to me that the whole transaction was illegal.

The view I take of the section is that the Legislature, appreciating the terrible results of the touting system, has interfered to make illegal any transaction which has been brought about by touting, and has said that such a transaction will be illegal, even if it is not proved that the tout was acting with the authority of the money-lender, and will be illegal so far as concerns the money-lender, provided only that it appears that the money-lender consented to or connived at the touting operation. In the present case there is no doubt whatever that Pinto knew that it was by Harwood that the lady was brought to him, and Pinto must have known that the transaction was brought about by Harwood inviting the lady to borrow money from him, Pinto, as in fact she did. It is clear to me that going on with the transaction with the knowledge that Mr. Pinto necessarily had of the position, he must be taken to have consented to or connived with the part which Mr. Harwood took in the transaction. The result is that the plaintiff is entitled to a declaration that the transaction was illegal and the bill of sale given as part of the transaction, void.

However, it may be that on the construction of this section I am wrong, and on that assumption it is right, for the assistance of any other Court before whom the matter may come, that I should express my view as to the other part of the case.

The other part of the case is this: it is suggested that this transaction, on any view of the matter, can be reopened,

because the interest charged was excessive and the transaction was harsh and unconscionable. There was the clearest evidence from the defendant's own witnesses that the 500*l.* was amply secured by the bill of sale. The interest at which the 500*l.* was advanced was 48 per cent. per annum. Now under the new Act, s. 10, the Legislature instructs me that I am to presume, unless the contrary is proved, that interest charged is excessive and the transaction is harsh and unconscionable, if it is found the interest exceeds the rate of 48 per cent. per annum. Accordingly the Legislature instructs me that, if this transaction had been one without security, and the interest charged had been 48¼ per cent. per annum, unless the contrary is proved, I must presume it to have been a harsh and unconscionable transaction by reason of an excessive rate of interest. If that is the position where there is no security at all, how can I possibly hold that interest at the rate of 48 per cent. per annum is not excessive interest, where there is ample security for the sum advanced? However, the circumstances of this case are depressingly familiar. It is plain to me that this lady was a mere baby in the hands of those with whom she was so misguided as to deal. I have no hesitation whatever in saying that 48 per cent. was grossly excessive interest, having regard to the security that was being given. I have no hesitation in saying that it was so excessive that that of itself is sufficient to justify me in finding that the transaction was harsh and unconscionable.

Accordingly, but for the decision I have already given that the whole matter is illegal, I should have felt it my duty to exercise the power vested in me by the Act to reopen this transaction and to allow the defendant interest on the actual sum advanced, which was admittedly 500*l.*, at the rate of 15 per cent. per annum, and he would on his counterclaim have obtained that relief. As the matter, however, stands, I must make in the action the declaration I have already intimated and order the defendant to pay the costs of the action, and I must dismiss the counterclaim with costs.

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I wish to say a few words regarding the payment of 21*l.* by the plaintiff to the solicitor. It was paid, as we know from the document which the lady signed at his request, to cover fees and out-of-pocket expenses, he undertaking to carry through on the lady's behalf the drawing and registration of the bill of sale in favour of Mr. Pinto and the necessary documents in connection therewith. The solicitor explained to me in the box that he had not appreciated at the time that he made that arrangement with the lady the effect of s. 12 of the new Moneylenders Act, and it is as well that the operation of that section should be understood.

Sect. 12 of the Moneylenders Act provides that: "Any agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or, in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly."

In the case of an ordinary transaction between mortgagor and mortgagee it is well known practice that the costs of carrying through the whole thing are borne by the mortgagor, and the course is exceedingly common for one solicitor to be the only solicitor concerned and to charge a fee which is paid by the mortgagor and which covers all the expenses of carrying the transaction through. It will be observed, however, that the situation in regard to a loan to which the new Moneylenders Act applies is different. The solicitor ought to have advised his client, the plaintiff, that the expenses of such matters as registration of the bill of sale were expenses which the money-lender could not throw upon her and which she ought not to pay: and that, if she paid them, she could under s. 12 recover them back from the

money-lender. The net result was that the plaintiff was made to pay an inclusive fee for the work, part of which ought to have been done at the expense of the money-lender and could not be charged against her. However, attention was drawn to the matter when the solicitor was in the box, and he undertook to consent to the bill being taxed, although it had been paid: and the situation, so far as the present case is concerned, was thus satisfactorily met.

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H. C. H.

The defendant appealed. The appeal came on for hearing on December 7, 1928.

C. A.

Edward Clayton K.C. and *H. J. Wallington* for the appellant. In construing s. 5, sub-s. 3, of the Moneylenders Act, 1927, Clauson J. failed to give sufficient weight to "such" in the second of the third prohibitions contained in the sub-section. The words "such agent or canvasser" mean that the agent or canvasser must have all the attributes of the agent or canvasser mentioned in the first prohibition. He must be employed by a money-lender or some person on his behalf "for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender." If the section had read John Brown shall not employ "any agent or canvasser for the purpose," etc., "and no person shall act as such agent," it could not have been contended that "such agent" did not mean an agent employed by John Brown. Sect. 3 is a section creating a number of misdemeanours and should therefore be construed strictly.

[LORD HANWORTH M.R. If a person purports to act as agent without authority, his agency can be confirmed afterwards.]

No doubt there can be ratification as regards a civil obligation, but ratification could not be used to convert an innocent act into a criminal offence. If "such agent or canvasser" be construed, as Clauson J. has done, as "agent or canvasser for the purpose of inviting," etc., it is ungrammatical unless it be treated as an elliptical way of saying "agent or canvasser

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employed by a moneylender for the purpose," etc. Moreover the words "agent or canvasser" connote an employer.

Sub-s. 5 affords a guidance to the construction of sub-s. 3. The mischief aimed at was the employment by money-lenders of touts, and sub-s. 5 says any person acting in contravention of the provisions of that section is guilty of a misdemeanour. The object of the first and second prohibitions in sub-s. 3 was to make, first, the act of the money-lender in employing an agent a misdemeanour on the money-lender's part; and, secondly, the act of the agent employed by the money-lender a misdemeanour on the agent's part. The two prohibitions are really complementary.

The third prohibition stands on a different footing, for it was intended to prevent any one (whether employed or not) from receiving payment for introducing any person to a money-lender. Here Harwood was acting throughout as the plaintiff's agent and not the defendant's.

Hilbery K.C. and *Frank G. Enness* for the respondent. The construction put upon the sub-section by Clauson J. is correct. The mischief intended to be struck at is not the limited mischief that the appellant contends, but the mischief of the whole practice of touting, by which persons having no employer tout and make a profit out of it. The use of the word "canvasser" as well as "agent" shows this. A person can and frequently does canvass for himself.

[LAWRENCE L.J. The word "canvasser" then would include a money-lender himself?]

Yes, just as it does in the earlier sub-sections when the expression "no person" is used. The whole intention of the sub-section is to prevent solicitation, just as the earlier sub-sections prevent the sending of circulars and advertising with certain specified exceptions.

Sub-s. 6 renders a transaction contravening any of the provisions of s. 3 illegal "unless the moneylender proves that the contravention occurred without his consent or connivance." If the second prohibition is read as contended for by the appellant, that proviso protecting a money-lender who has not consented or connived could have no application

to it. Nor is it grammatically necessary to import into the second prohibition the qualification of being employed by a money-lender, and by so construing the second prohibition, you lose the antithesis between "no moneylender . . . . shall employ" and "no person shall act." If it was intended to import the quality of being employed by a money-lender, would not the second prohibition have read "no person so employed shall act . . . ."?

Clayton K.C. in reply. The word "such" must be used in the second prohibition to import all the qualifications of an agent or canvasser in the first prohibition, and not some of them only.

Cur. adv. vult.

Dec. 19. LORD HANWORTH M.R. In this action the plaintiff claimed a declaration that a money-lending transaction entered into by the plaintiff with the defendant on January 9 and 10, 1928, is illegal, and the bill of sale given by the plaintiff to the defendant in connection therewith, void.

Alternatively, the plaintiff asks that the transaction should be reopened as being harsh and unconscionable.

The relevant facts which it is necessary to recount in connection with this judgment are taken from the findings stated by the learned judge. It appears that the plaintiff is a widow, with children dependent upon her, and in possession of an income which, although not inconsiderable, has proved insufficient for her needs. She has, therefore, from time to time had recourse to money-lenders; and this before December, 1927, when the incidents occurred which are the source of her present trouble. A lady money-lender in Golden Square in that month introduced her to Clive Everton, Ld., money-lenders, and was paid 15*l.* for the introduction. Mr. Harwood was the manager of this company, which, following the learned judge, I will call Mr. Harwood's firm. By December 21, 1927, Mr. Harwood's firm had made loans to the plaintiff of a total sum of 400*l.* upon a promissory note signed by the plaintiff, repayable by post-dated cheques falling due over a period of some months in this year, and had

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commenced to take an inventory of the furniture in the lady's house in Devonshire, which was to be covered by a bill of sale as security for the loan. The plaintiff was anxious to get a loan not of 400*l.* but of 500*l.*, and so she came to town on January 9 and saw Mr. Harwood, who would not entertain a loan for 500*l.*, as he had a "prejudice" against bills of sale. But Mr. Harwood "had a friend" who would be prepared to do the business. On this January 9 the plaintiff signed a letter which was prepared for her signature in Mr. Harwood's office: "Dear Sirs, Will you kindly introduce me to some person or money-lenders so that I may obtain an advance to enable me to pay you off the money I owe you, as I understand you are not prepared to let the same stand over." Mr. Harwood told the plaintiff that the business would be done by some one else, and the lady was taken by a clerk of Mr. Harwood's to a solicitor, who would act for her in this intended business with the fresh money-lender. The latter was the defendant Pinto, and Clauson J. finds it established that, at the time when the plaintiff went to the solicitor's office, an arrangement had been made with Pinto that he would carry out the loan of 500*l.* to the plaintiff. This was done on January 10. The bill of sale was completed; 500*l.* was lent by Pinto to the lady; 21*l.* was paid to the solicitor for his services; Harwood was paid the 400*l.* at a date before it was due, and the lady was left with whatever balance remained after payment to Harwood, for a loan for which, as Clauson J. finds, "she did pay very heavily indeed."

The question to be decided is what is the true construction to be placed upon s. 5, sub-s. 3, of the Moneylenders Act, 1927, which had come into force on January 1, 1928, and so was in operation when the transaction of this new loan of 500*l.* by the defendant to the plaintiff was carried out.

Harwood and Pinto are brothers, but Clauson J. is not prepared to find as a fact that Pinto employed Harwood to act as his agent in the transaction: he does hold that Harwood acted as a canvasser or tout for Pinto, even though he had no master employing him at the time he acted as such.

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I have given careful attention to the point raised by Mr. Wallington that Harwood acted as agent for the borrower and not for the lender and that there was no evidence that the defendant ever employed or adopted Harwood as his agent. In view of the finding of Clauson J. already referred to, that he was not prepared to hold that the defendant did employ Harwood, there is ground for the contention thus advanced by Mr. Wallington, but in my judgment that question is not vital to the judgment. Clauson J. does hold, as upon the evidence he was entitled to hold, that Harwood acted as a tout or canvasser for the defendant or as an agent for him, using that word in its widest sense, as I think it is used in sub-s. 3 of s. 5.

The word "agent" is a much abused term, as was pointed out by Lord Herschell in *Kennedy* v. *De Trafford* (1), when he says: "A person may be spoken of as an 'agent,' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

In my judgment, the word "agent" as used in sub-s. 3 is used in its widest popular sense and is little different from the word "canvasser," which is employed as an alternative term to it. I agree with the construction of the section adopted by Clauson J., and I do not hold that the word "such" introduces the qualification that an agent employed by a money-lender, and only as and when employed by a money-lender, is intended. The word "such" relates back to the agent or canvasser whose purpose is to invite any person to borrow money, or to enter into any transaction involving the borrowing of money from a money-lender and not to the further limitation of actual employment in that purpose by a money-lender. The prohibition is not against being employed, but wider—"No person shall act" whether in actual employment or not. It includes those who act for the purpose of inviting any person to borrow money, etc.,

(1) [1897] A. C. 180, 188.

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in the hope that their actions will result in their obtaining a commission.

The structure of the whole section makes that plain to my mind. It opens in sub-s. 1 with : " No person shall knowingly send," etc. Then in sub-s. 2 : " No person shall publish." Sub-s. 3 follows : " No moneylender or any person on his behalf shall employ," and then reverts to the wider words " No person shall act." The prohibition in sub-s. 3 may be split up into three parts : (*a*) No money-lender shall employ. (*b*) No person shall act. (*c*) No person shall demand any sum. The accusative to the verb "employ" is an agent or canvasser for the purpose, etc., and that accusative is what is brought forward by the word " such " into the second and wider prohibition.

I agree, therefore, with the interpretation placed by Clauson J. upon the section, and also with his application of the section to the facts, and also with the observations that he makes in answer to the objection that the interpretation which he and I give to the section involves hardship upon the money-lender.

The result is that the transaction completed on January 10 is rendered illegal. In my view, therefore, the appeal ought to be dismissed ; but as unfortunately there is a difference of opinion between the members of the Court, the order will be that which will be stated by Lawrence L.J.

LAWRENCE L.J. This appeal raises the question what is the true meaning of the words " and no person shall act as such agent or canvasser " in sub-s. 3 of s. 5 of the Moneylenders Act, 1927. This sub-section contains three prohibitions : First, that no money-lender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender ; secondly, that no person shall act as such agent or canvasser ; and thirdly, that no person shall demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking

to introduce to a money-lender any person desiring to borrow money. Clauson J. has held that there has been no contravention of the first prohibition, and that as no contravention of the third prohibition had been pleaded, he had nothing to do with that prohibition.

This case, therefore, is concerned only with the second prohibition, and the question is whether there has been any contravention of that prohibition. The learned judge, after stating that there was really no dispute whatever that Harwood had invited the plaintiff to borrow money from the defendant, held that the invitation so given constituted Harwood a canvasser for the purpose of inviting the plaintiff to borrow money from a money-lender within the meaning of the second prohibition, and that consequently there had been a contravention by Harwood of this prohibition, and further that, as the defendant had not proved that the contravention had occurred without his knowledge or connivance, the money-lending transaction between the plaintiff and the defendant was illegal by virtue of the provisions of sub-s. 6.

In arriving at this conclusion, the learned judge has, in my opinion, placed too restricted a meaning on the word "such" in the second prohibition, and has in effect construed that prohibition as if it had been couched in the words "and no person shall act as an agent or canvasser for such purpose" instead of in the words actually used.

The point which arises is extremely narrow and not capable of much elaboration. The way it strikes me can be stated in a few sentences. The adjective "such" in its collocation in sub-s. 3 qualifies the nouns "agent or canvasser" and means "of the character before mentioned." It relates back to the first prohibition, and carries with it all the characteristics of the agent or canvasser there mentioned. These characteristics are twofold, first, that he is employed by a money-lender or some person on his behalf, and secondly, that he is employed for the particular purpose there specified. No description of an agent or canvasser falling within the first prohibition would be complete unless it combined both these

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characteristics, each of which is an integral part of his description, and the omission of one or other would result in an incomplete description. So far as I can see there is nothing in the context to restrict the operation of the word "such" to only one of these characteristics to the exclusion of the other, and in my opinion there is no valid ground or justification for any such restriction. For these reasons I am of opinion that the second prohibition means that no person shall act as an agent or canvasser employed by a money-lender or any person on his behalf for the purpose of inviting, etc.

As I read the first two prohibitions they are correlative and are aimed at hitting both parties to the same transaction, so that in case of any contravention both the employer and the employee would incur the penalties imposed by sub-s. 5.

This really disposes of the appeal, but before parting with the case I desire to make a few observations on some of the arguments addressed to this Court by counsel on either side. Mr. Clayton, in the course of his argument in support of the appeal, took two points, both of which deserve attention—namely, first that the words "agent or canvasser" in the second prohibition connote an employer; and secondly, that the expression "agent or canvasser for the purpose of inviting, etc." (which according to the learned judge's decision would be the description of a person acting in contravention of the second prohibition) is ungrammatical unless it be treated as elliptical.

As to the first of these points, although no word is more commonly and consistently abused than the word "agent" and although many persons without a principal call themselves and are called by others "agents" (see per Lord Herschell in *Kennedy* v. *De Trafford* (1)), yet I think that Mr. Clayton is right in his contention that the word "agent" is used in the second prohibition (as it undoubtedly is in the first) in its legal sense and connotes the existence of a principal, and further, that the context indicates that the principal is the same as the one mentioned in the first prohibition—namely,

(1) [1897] A. C. 188.

a money-lender or some person on his behalf. As regards the word "canvasser," although the verb "to canvass" is commonly applied to a person who solicits business on his own behalf, yet the noun "canvasser" in common parlance is more usually applied to a person canvassing on behalf of an employer and is, in my opinion, so used not only in the first, but also in the second prohibition, the employer indicated being, as in the case of the agent, a money-lender or some person on his behalf. As to the second point, I agree with Mr. Clayton that the expression "agent or canvasser for the purpose of inviting, etc.," is elliptical, and that in view of the context the part left out and to be implied would properly be culled from the first prohibition, and would be "employed by a moneylender or person on his behalf."

Turning now to some of the arguments advanced by Mr. Hilbery in support of the respondent's case. First, as to the contention that on the appellant's construction the antithesis between the words "employ" in the first prohibition and "act" in the second is lost. The answer to this contention is that in my opinion these words are not set in opposition to each other, but on the contrary are complementary, the former being used to denote the act of the employer and the second being used to denote the act of the person employed in the same transaction.

Next, as to the contention that the appellant's construction is unnecessarily narrow and contrary to the spirit and intention of the Legislature, as shown by the rest of s. 5. In support of this contention it is pointed out that all the prohibitions contained in the section, except the first prohibition in sub-s. 3, commence with the words "no person shall" and are thus addressed to every member of the public, whether a money-lender or not, and that this shows that the words "no person" in the second prohibition in sub-s. 3 are aimed at suppressing all touts whether they be money-lenders or persons employed by money-lenders or free lances acting on their own account, and ought, therefore, to be construed as being impersonal and as having nothing to do with any

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employment by a money-lender. This contention, in my opinion, confuses the prohibited persons with the prohibited act. No doubt the second prohibition prohibits every person, whether a money-lender or not, just like the earlier sub-sections, but in each case the prohibition is directed against the doing of a particular act which is specifically defined, and the question in this case is as to the scope of the act which is prohibited, not as to the persons who are prohibited from doing the act. On the latter head there is no dispute that the prohibition embraces every member of the public. In this connection it is to be noted that the Act of 1927 does not prohibit a money-lender from orally inviting persons to borrow money from himself, indeed had it done so it is difficult to see how a money-lender could have carried on his business at all. Yet the second prohibition if construed as the learned judge has construed it would, in my opinion (by reason of its undoubtedly extending to money-lenders), indirectly operate to prevent a money-lender from orally soliciting business on his own account, as such solicitation would, according to the ruling of the learned judge, constitute the money-lender a canvasser for the purpose of "inviting a person to borrow money or enter into a transaction involving the borrowing of money from a moneylender." When this proposition was put to Mr. Hilbery in the course of his argument he did not shrink from such a result, but on the contrary maintained that this was what the Legislature intended. I cannot help thinking that if it had been the intention of the Legislature to prohibit all touting at large (especially if such prohibition were to include the touting by a money-lender on his own behalf) the second prohibition would have been framed so as directly to prohibit any person from inviting, etc., instead of going about it in such a roundabout manner and purporting to effect the same result by prohibiting any person from acting as an agent or canvasser for the purpose of inviting, etc. Moreover, I do not think that the Court ought to impute to the Legislature an intention to create a criminal offence in such a dubious way.

The only other contention to be noticed is that the last sentence of sub-s. 6 would have no application to a contravention of the second prohibition, if the appellant's construction were adopted. There is nothing in this contention. The section in question contains a general provision applicable to all the sub-sections, and it necessarily has no application whenever the contravention is brought about by an act of the money-lender himself; in any event it never could have any application to the first prohibition.

Lastly, I would observe that however vicious the system of passing on a borrower from one money-lender to another may be, and however desirable it may be to put a stop to such a system, I can find nothing in sub-s. 3 to prohibit it so long as the money-lender who passes on the borrower is not employed by the money-lender to whom the borrower is passed on, and so long as the former does not demand or receive any money or other valuable consideration for introducing or undertaking to introduce the borrower to the latter.

In the result, for the reasons stated, I am of opinion that this appeal ought to succeed and that the order of Clauson J. ought to be discharged, and that in lieu thereof an order should be made in the action declaring that the interest charged by the defendant was excessive and that the money-lending transaction between the plaintiff and defendant was harsh and unconscionable, and ordering that the transaction be reopened and that the rate of interest be fixed at 15 per cent. per annum, and that on the counterclaim there should be an order for an account of what is due from the plaintiff to the defendant on the footing of the declaration and order made in the action, with liberty to apply to the Court below for payment of the amount found due and generally. As each party has partially succeeded and partially failed, there should be no costs to either party of the action or counterclaim in the Court below up to and including the hearing before Clauson J., and the subsequent costs should be reserved to be dealt with in the Court below.

The respondent should pay the costs of this appeal.

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RUSSELL L.J. The result of close argument on the hearing of this appeal was to reduce the points for decision to a single question—namely, the construction of what was called during the discussion part (*b*) of sub-s. 3 of s. 5 of the Moneylenders Act, 1927. That sub-section was treated, and I will for convenience treat it, as consisting of three parts thus: (*a*) No money-lender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender. (*b*) No person shall act as such agent or canvasser. (*c*) No person shall demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a money-lender any person desiring to borrow money.

The sole point of construction arises in regard to (*b*) and is this: Does it prohibit all persons from acting as agents or canvassers for the purpose of inviting, or does it only prohibit from acting as agents or canvassers for the purpose of inviting, persons employed by a money-lender or a person on his behalf as mentioned in (*a*)? In other words, how much of the description or qualities or attributes to be found in (*a*) of the agent or canvasser mentioned in (*a*), are carried over into (*b*) by the use in (*b*) of the word "such"?

Clauson J. has decided that all that is carried over into (*b*) by the word "such" is the feature (I use that as a convenient word to denote description, qualities or attributes) of being an agent or canvasser for the purpose of inviting. So that (*b*) written out at length would run: "No person shall act as an agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender." If this is correct, then upon the facts found by the judge, the transaction in suit was illegal under sub-s. 6, and the judgment under appeal must stand.

The appellant, however, contends that you must carry over all the features of the agent or canvasser which are to be found in (*a*), and accordingly that (*b*) written out at length

would run: "No person shall act as an agent or canvasser employed by a money-lender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender." If this is correct, then upon the facts found by the judge the transaction in suit was not illegal under sub-s. 6 and the judgment under appeal cannot stand.

Sect. 5 contains many restrictions and prohibitions in regard to money-lenders.

Sub-s. 1 prohibits (putting it generally) money-lenders' advertisements by means of circulars. It does so by forbidding knowingly sending or delivering money-lenders' circulars except in response to a written request, and the sub-section is binding on every one irrespective of any question of employment: "No one shall knowingly send."

Sub-s. 2 prohibits (subject to a proviso) money-lenders' advertisements by means of newspapers or posters or placards. The proviso permits certain forms of money-lenders' advertisements by means of newspapers, posters or placards. That sub-section is also binding on every one irrespective of any question of employment: "No person shall publish."

Sub-s. 3 deals with or at all events includes oral communications. I have already narrated its provisions. Sub-s. 4 provides how in a document issued by or on behalf of a money-lender the terms of interest proposed to be charged must be expressed.

Sub-s. 5 provides that any person acting in contravention of any of the provisions of s. 5 shall be guilty of a misdemeanour and liable to imprisonment and a fine.

Sub-s. 6 runs thus: "Where it is shewn that a money-lending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance."

It was argued for the respondent that since the prohibitions in sub-ss. 1 and 2 applied to all persons irrespective of any

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question of employment by virtue of the words "No person shall," when you find in sub-s. 3, part (*b*), the words "and no person shall" you should give them the same meaning and treat them as meaning and applying to all persons irrespective of any question of employment. This contention does not appear to me to advance the respondent's case, for it does not take into consideration the reference to employment in part (*a*) of sub-s. 3 and the use of the word "such" in part (*b*).

It was further argued for the respondent that the construction of the appellant cannot be correct, because if employment by a money-lender, or by some one on his behalf, is a feature of the agent or canvasser mentioned in part (*b*), then the last sentence of sub-s. 6 of s. 5 can never come into operation in relation to part (*b*) of sub-s. 3. This is true, and the argument would, I think, be of great weight if sub-s. 6 related only to contraventions of part (*b*) of sub-s. 3, or even if it related only to contraventions of sub-s. 3; but the argument ceases to carry weight when it is realized that sub-s. 6 is in general terms and is applicable to all the provisions of s. 5.

The question for decision is primarily one of grammar, but certain other considerations are relevant. This is a section, a contravention of which is made a penal offence: it is a penal section constituting a new series of misdemeanours. So far as the language used in sub-s. 3, part (*b*), is susceptible of two readings, that version should I think be chosen which lessens the new list of misdemeanours rather than that which increases it; and this upon the footing that assuming there is an ambiguous expression in a provision which creates a new offence, the benefit of the doubt should be given to the subject. If upon the facts found in this case Harwood were indicted for acting in contravention of the provisions of part (*b*) of sub-s. 3, I find it difficult to believe that a defence of non-employment would not succeed, on the ground, putting it at the lowest, that it was not clear that employment was not a necessary ingredient of the offence. But apart from this consideration and without suggesting any ambiguity, I

differ from the construction adopted by Clauson J. for the following reasons: (1.) The natural meaning of the word "such," as I understand it, is "of the quality or kind already mentioned." If I am right in this, and you turn back to part (*a*) to ascertain the quality or kind of agent or canvasser already mentioned, you find language which shows that he is employed by a money-lender or some person on the money-lender's behalf. How can I reject that particular feature, and hold that it is not to be applied to the agent or canvasser referred to in part (*b*)? It is not enough to say that the word "such" can be made to operate and be given a meaning by reading into part (*b*) the words from part (*a*) "for the purpose of inviting," etc. The word "such," if given its natural meaning and operation, will include also the feature of employment, and there is no reason or justification for restricting or cutting down its natural meaning and operation. (2.) In my opinion the words in part (*a*) "for the purpose of inviting," etc., relate grammatically back to the word "employ," and what part (*a*) means is this: (I am paraphrasing) "No money-lender or person on his behalf shall employ for the purpose of inviting, etc., any agent or canvasser," and not "No money-lender or any person on his behalf shall employ any agent or canvasser whose function is inviting, etc." If this is the right construction of (*a*), and in my opinion it is, then the feature of the employment is inevitably carried forward into part (*b*). (3.) Part (*b*), as construed by the learned judge, involves a description of a person as being "an agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender." Such a description would be ungrammatical if it were not elliptical. The words "for the purpose of inviting" and the nineteen words which follow cannot be grammatically used to qualify or describe a noun. A composite sentence is not a participial adjective. Some participial adjective must be supplied. In the present case the word whose presence is necessary to make the description complete and grammatical can only (in view of part (*a*)) be the word "employed."

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For these reasons, I am of opinion that part (*b*) of sub-s. 3 should be construed as though it ran: "No person shall act as an agent or canvasser employed by a money-lender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender."

The result is that upon the facts as found there was no contravention of the provisions of part (*b*) of sub-s. 3, and the appeal must be allowed. I agree with the order proposed by Lawrence L.J.

Appeal allowed.

Solicitors: *W. H. Speed & Co.; Woolfe & Woolfe.*

H. C. G.

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KENNEDY *v.* THOMASSEN.

[1928. K. 175.]

Contract—Offer and Acceptance—Offer to redeem Annuity for lump Sum—Release of Annuity executed by Annuitant—Death of Annuitant before Acceptance communicated to Purchasers—Money paid in Ignorance of Annuitant's Death—Failure of Consideration—No concluded Contract.

Under the will of her then husband made in 1902 and a separation deed and settlement made in 1903 V. was entitled to two annuities of 200*l.* each. The testator, who was also the settlor, died in 1913, and V. afterwards married a Dutch subject, and for the remainder of her life resided in Holland. In 1927 the trustees of the will offered to redeem both annuities, and after some negotiations were informed by V.'s solicitors that they would advise her to accept 6000*l.* for redemption, the annuities to be paid in full up to the date of redemption. The trustees sent the solicitors a draft release for their approval. V. having informed her solicitors that she would accept the offer of 6000*l.*, they sent her the release engrossed for her execution, and she executed it on January 12, 1928. On January 17 she died, but no notification of her death was received by her solicitors in London until January 31. In the meantime the trustees having been informed by V.'s solicitors on January 24 that she had accepted the 6000*l.*, on January 30 paid the money to them, being then in ignorance of V.'s death:—

Held, that there was no concluded contract for the sale and purchase of the annuities, as the purchasers could not have intended their offer to be accepted by the vendor merely executing a document.

But even assuming there was a concluded contract, there was a total failure of consideration, owing to the death of the annuitant before completion, and the trustees were entitled to recover back the 6000*l*.

Strickland v. *Turner* (1852) 7 Ex. 208 applied.

INTERPLEADER ISSUE.

By a separation deed and settlement dated December 23, 1903, and made between James Webster of the first part, Elizabeth Wilhelmina Gerhardina Webster his wife of the second part, and persons therein named as trustees of the settlement of the third part, it was provided that the trustees should hold a sum of 8000*l*. stock, which had been transferred by the said James Webster into their names upon trust during the life of the said E. W. G. Webster, if she should at all times observe and perform all the covenants and stipulations therein contained to pay her out of the income thereof the clear annual sum of 200*l*. by half yearly payments on January 6 and July 6 and subject thereto the settlement trustees were to hold the said fund and the income thereof in trust for the said James Webster absolutely.

By his will dated September 30, 1902, the said James Webster, having appointed the plaintiffs trustees thereof, devised his real and all the residue of his personal estate unto them upon the trusts therein declared, subject nevertheless to the payment of certain annuities, including an annuity of 200*l*. to his said wife, E. W. G. Webster, during her life. The testator died on April 18, 1913, and his will was duly proved. After his death Mrs. Webster was married to Pieter Leonhard Elija Vyzelaar, a Dutch subject resident in Holland, who died in or about the year 1920, leaving his widow surviving him.

The plaintiffs, desiring to distribute the residuary estate of the testator, proposed to the surviving annuitants under his will, including Mrs. Vyzelaar, to commute their annuities by payment to them of a capital sum. Accordingly the plaintiff's solicitors by letter dated November 17, 1927, addressed to Messrs. Long & Gardiner, as solicitors for Mrs. Vyzelaar, offered to pay her the sum of 5378*l*. 16*s*. 8*d*. in satisfaction of the two annuities of 200*l*., each payable to her under the separation deed and will aforesaid. This

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offer was not accepted, and after considerable negotiations by letter Messrs. Long & Gardiner informed the plaintiff's solicitors that if they would make her an offer of 6000*l.* they would advise Mrs. Vyzelaar to accept it.

On January 5, 1928, the half yearly instalment of the 200*l.* annuity payable to Mrs. Vyzelaar under the separation deed was sent by the plaintiff's solicitors to Messrs. Long & Gardiner, and on January 9, 1928, a draft deed of release was sent to them for their approval in the event of Mrs. Vyzelaar's acceptance of the offer of 6000*l.* Messrs. Long & Gardiner caused the draft to be engrossed, and sent it to Mrs. Vyzelaar for her execution. She executed it on January 12, 1928, in the presence of the British Consul and a Dutch notary, and it was returned to Mr. Henry Smith, a member of the firm of Long & Gardiner, with a covering letter written at Mrs. Vyzelaar's request, saying that she was ill, but had executed the document. The letter proceeded, "I also hope you will not part with the document before they have paid." Mr. Smith had previously written to her saying that he would not part with the release except upon payment of the annuity up to date and 6000*l.* in cash. On January 24 Messrs. Long & Gardiner wrote to the plaintiff's solicitors as follows: "We have now obtained Mrs. Vyzlaar's receipt and release for 6000*l.* duly authenticated by the British Consul at the Hague. . . . . We shall be glad to know when the matter is ready for completion." In reply the plaintiff's solicitors acknowledged receipt of this letter, and said that the trustees' cheque for 6000*l.* would be handed over to Messrs. Long & Gardiner "in exchange for the receipt and release, on hearing from you that such cheque can be made payable to Mrs. Vyzelaar or to such lady per yourselves." The letter added that the trustees would also pay to Mrs. Vyzelaar the proportion of her 200*l.* annuity under the will to date of payment of the 6000*l.*, which they suggested should be paid "on Monday next, the 30th instant, if you agree the terms hereof." Messrs. Long & Gardiner replied that they saw no objection to the cheque being made payable to Mrs. Vyzelaar per themselves.

Mrs. Vyzelaar died on January 17, but no notification of her death was received by her solicitors or any person in England until January 31, when they received a letter dated January 30 from the defendant, who claimed to be sole executor under her will, informing them that she had died on January 17. On January 30, 1928, the plaintiffs being then still unaware of Mrs. Vyzelaar's death, paid Messrs. Long & Gardiner a sum of 6000*l.* by cheque, and received in return the release executed by her. The release until then had been undated, but the date January 30, 1928, was inserted on delivery of the cheque.

The plaintiffs having been informed of the death of Mrs. Vyzelaar by Messrs. Long & Gardiner, claimed from them the repayment of the 6000*l.*, but Messrs. Long & Gardiner refused to repay such sum on the ground that it was claimed by the defendant as executor of Mrs. Vyzelaar.

The plaintiffs thereupon brought this action, the writ naming Messrs. Long & Gardiner as defendants.

By order made on April 25, 1928, upon an interpleader summons taken out by Messrs. Long & Gardiner, the 6000*l.* was paid by them into Court, the claimant Thomassen was substituted for them as defendant to the action, and the trial of the following issue was ordered—namely, whether the said sum of 6000*l.* with interest belonged to the plaintiffs or the defendant.

Gover K.C. and *Humphrey H. King* for the plaintiffs. On the facts there was no concluded contract between the parties. But if there was any concluded contract at all it could not have come into existence before January 24, 1928, the date on which the fact of Mrs. Vyzelaar's acceptance of the trustees' offer was first communicated to the trustees.

If that be so then two results follow: (1.) the offer lapsed by the death of Mrs. Vyzelaar before that date, and (2.) her death revoked the authority of her solicitors to notify her acceptance to the plaintiffs.

Thirdly, even assuming that there was on January 24 a concluded contract between the parties, it was void or

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voidable as against the plaintiffs, by reason of the fact that the annuities had ceased to exist at the death of the annuitant. The subject-matter of the contract was gone, and there was a total failure of consideration.

On the first point it is clearly established that acceptance must be communicated to the other party; a mere mental acceptance is insufficient: *In re Consort Deep Level Gold Mines* (1); *Byrne & Co.* v. *Van Tienhoven.* (2) The law is fully stated by Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (3), where he quoted from memory, with approval, a passage from a judgment of Brian C.J. in one of the Year Books (4), laying down the rule. The only exception to the general rule that notice of acceptance is required is in those cases where the offeror promises to pay a sum of money for the performance of a certain act, or, for example, a reward for finding something or giving certain information. These cases are fully discussed in *Carlill* v. *Carbolic Smoke Ball Co.* (5), but they have no application to the present action.

The plaintiffs only supplied the solicitors of the annuitant with a draft release to approve on her behalf. Instead of approving and returning it for engrossment they had it engrossed themselves and sent it to her to execute. The plaintiffs had no knowledge either of the approval or the execution until January 24, a week after Mrs. Vyzelaar's death. In *Reynolds* v. *Atherton* (6) Warrington L.J. held that an offer lapsed by the death of the person to whom it was made.

On the second point, the death of the annuitant revoked the authority of her solicitors to communicate her acceptance to the trustees. The only exception to this rule is in the case of agents appointed by power of attorney. On the last point, that of failure of consideration, even if the contract had involved the execution of a conveyance, the Court would set it aside: Fry on Specific Performance, s. 905, p. 426.

(1) [1897] 1 Ch. 571, 591.
(2) (1880) 5 C. P. D. 344.
(3) (1877) 2 App. Cas. 666, 691.
(4) 17 Edw. 4, *Term, Pasch* case 2. The passage is also quoted in Anson on Contract (16th ed. at p. 28).
(5) [1893] 1 Q. B. 256.
(6) (1921) 125 L. T. 690; affirmed in H. L. 127 L. T. 189.

In *Strickland* v. *Turner* (1) a contract for the sale of an annuity was held to fail owing to the death of the annuitant. That decision was approved in *Turner* v. *Greene* (2) and in *Huddersfield Banking Co.* v. *Lister*. (3)

Topham K.C. and *Cleveland-Stevens* for the defendant. There is no total failure of consideration; the contract was made when Mrs. Vyzelaar executed the release on January 12, 1928. There was what is called in Anson on Contract, 16th ed., p. 19, "an offer of a promise for an act." The offer was to pay the sum of 6000*l.* on the execution of a release by the annuitant.

The completion account, paying the annuity down to January 30, was wrong, and the annuity should only have been paid down to January 12.

The deed was delivered as an escrow, and when the money was paid the performance of the condition dated the contract back to the date of execution: *Carlill* v. *Carbolic Smoke Ball Co.* (4); *Foundling Hospital* v. *Crane*. (5)

[EVE J. But the agency of Mrs. Vyzelaar's solicitors would determine on her death.]

Yes, but Mr. Smith was more than her agent merely; he was the recognized channel of communication, with authority to deliver the message and continue. The principle is stated in *Henthorn* v. *Fraser* (6), referring to *Dunlop* v. *Higgins*. (7)

The offer was made to Mrs. Vyzelaar and was accepted, becoming a complete contract by the execution of the release.

No reply was called for.

EVE J. This case in my opinion can be disposed of upon the short point that there never was a concluded contract for the sale and purchase of these annuities. Negotiations commenced in October, 1927, and by the middle of November the intending purchasers communicated to Messrs. Long & Gardiner, the recognized agents of the vendor, certain

(1) (1852) 7 Ex. 208.
(2) [1895] 2 Ch. 205, 210.
(3) [1895] 2 Ch. 273, 281.
(4) [1893] 1 Q. B. 256, 270.
(5) [1911] 2 K. B. 367, 382.
(6) [1892] 2 Ch. 27.
(7) (1848) 1 H. L. C. 381.

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alternative proposals for the purchase. Each of these proposals involved the payment of a sum of money and the payment of the annuities down to the date of completion. The letter of November 17, which I need not read again, clearly shows that. The alternatives there presented did not commend themselves to the vendor, and the matter went on; further correspondence followed, and on December 21 Mr. Smith, the member of the firm of Messrs. Long & Gardiner, who was attending to the matter, wrote to the purchasers' solicitors, Messrs. Rutter & Marchant: "I have been in communication with my client, but have not been able to make her alter her decision. I think, however, I should point out that you did not give me much ground for argument, as your last offer was still below the price of a Government annuity of 400*l*. If you can make a firm offer of 6000*l*. cash I am prepared once again to approach my client and will advise her to accept that sum. If the above suggestion is carried through the existing annuities must of course, in accordance with your letters, be paid to the date of payment of the capital sum and the trustees' costs discharged." Messrs. Rutter & Marchant thereupon took further instructions from the purchasers, and on December 23 they informed Mr. Smith by telephone of the willingness of the purchasers to give the 6000*l*., and to accept the conditions laid down in his letter of December 21. This information Mr. Smith communicated to his client in a letter of the same date. The vendor was not at first disposed to accept this offer, but after some further correspondence between her and Mr. Smith, in which she asked for and was given fuller information, she on January 9 wrote to Mr. Smith thanking him for his letters, and saying, "I will accept on your advice the offer of 6000*l*." That was communicated to Mr. Smith, not as the agent of the purchasers, but in order that he, as the agent of the vendor, should communicate to the purchasers her acceptance of their offer. It is not a case where the mere posting of the acceptance concluded the contract. The acceptance of the offer was not in fact communicated to the purchasers' solicitors until January 24, and between January 9

and 24 the vendor had died. The effect of her death was to determine Mr. Smith's agency. In my opinion after her death he had no authority from her or anybody representing her to communicate the acceptance to the purchasers, and in the absence of such communication no contract was ever concluded. It has however been argued that a contract was concluded apart from any communication of any acceptance of the offer to the offerers. The offer, it is contended, of December 23 only required one thing to be done by the vendor, and that was to execute a release of the annuities, and when in fact, as it now turns out, she did on January 12 execute a release, she had by so doing done everything to complete the contract, and was relieved from any obligation to do anything more. Mr. Smith's statement of the offer, which had been made to him through the telephone, in his letter of December 23 to the vendor, is as follows: "I have just had a telephone message from Messrs. Rutter & Marchant that their clients have authorized them to make you an offer of 6000*l.* cash for a release of your annuities." What does that mean? Does it mean that the moment you sign the release a contract is concluded and it will not be obligatory either upon you or me to make any further communication to the purchasers? It only means this, that for the purchase of these annuities the purchasers are prepared to pay you 6000*l.*, and you will have to execute a release or some other appropriate document to carry out the matter. It is impossible to say that this was an offer which anybody contemplated could be accepted by the mere execution by the vendor of the document of January 12. It would be stretching the result of the cases referred to by Bowen L.J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1) far beyond what was contemplated, to hold that they applied to such a case as this. In my opinion it is a case in which the communication to the purchasers of the acceptance was necessary, and this never having been made during the time when the person authorized to make it had authority so to make it, no contract was ever concluded.

(1) [1893] 1 Q. B. 256.

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I might add that assuming there were a contract it was in my opinion one for the purchase of the annuities at a future date. It was not intended that the purchase should be completed as on the day of the letters or on January 12, the day when the release was executed. It was intended that the purchase price should be ascertained when the parties were ready for completion, and the purchase price was not merely the 6000*l.*, but it was that sum plus the apportioned part of the two annuities to be calculated down to the day of completion. The case therefore would fall within the authority of *Strickland* v. *Turner* (1), and had I held that there was a concluded agreement, I should have been bound to hold further that the death of the annuitant between contract and completion rendered the contract incapable of performance in that there was no consideration which the purchaser would receive for his money. The fund in Court belongs to the plaintiffs, and must be paid out to them. If there is no arrangement about the costs the defendant must pay them.

Solicitors: *Rutter & Marchant; A. F. & R. W. Tweedie.*

(1) 7 Ex. 208.

H. L. L.

In re TAYLOR'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* TAYLOR.

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Jan. 11.

Bankruptcy—Voluntary Settlement—Trust to accumulate Income—Power to Settlor to determine Accumulation and require uninvested Income to be paid to him and his Wife equally—Notice to Trustees in exercise of Power—Whether Power exercisable by Settlor "for his own benefit"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*b*).

A settlor by a voluntary settlement made in 1913 directed the trustees to whom he had transferred certain securities to accumulate and invest the income thereof subject to a proviso under which the settlor reserved to himself power, by notice given to the trustees, to require the income of any year or the residue of such income remaining uninvested to be paid as to one moiety to himself and as to the other moiety to a lady who afterwards became his wife, or if she should then be dead to require the whole income of such year or of the residue of such year to be paid to the settlor, with trusts after the death of the survivor of them in favour of the settlor's children therein named. In January, 1927, the settlor gave notice to the plaintiff as trustee that he required the whole income for that year to be paid as to one moiety to himself and as to the other moiety to his wife. In August, 1927, the settlor was adjudicated bankrupt:—

Held, that the power was indivisible, and could not be exercised by the settlor "for his own benefit" within s. 38 (*b*) of the Bankruptcy Act, 1914, but only for the joint benefit of himself and his wife, and therefore did not vest in his trustee in bankruptcy.

ADJOURNED SUMMONS.

By a voluntary settlement dated December 24, 1913, and made between John William Frederic Blake Taylor (the settlor) of the one part and the Public Trustee of the other part, certain stocks funds shares and securities which had been transferred to the Public Trustee and the property for the time being representing the same and all accretions thereto and accumulations of income under the provisions thereinafter contained all of which were included in the expression the "trust fund" were to be held by the Public Trustee upon trust to accumulate and invest the income during the life of the settlor. The trust for accumulation was subject to the following proviso:—

"Provided always that if prior to or during any year (reckoned from January 1 to December 31 next ensuing) the settlor shall give notice in writing under his hand to the

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trustees that he requires the income of such year or of the residue of such year (as the case may be) actually remaining uninvested in the hands of the trustees at the time of the receipt by them of such notice to be paid as to one moiety to him and as to the other moiety to Helena Jane Murray of 24 Grosvenor Place, London during her life or if she shall then be dead that he requires the whole income of such year or of the residue of such year remaining uninvested as aforesaid to be paid to him then the trustees shall pay one moiety of the income of the trust fund actually received by them remaining uninvested as aforesaid during such year or (as the case may be) during the residue of such year to the settlor and the other moiety of such income to the said Helena Jane Murray during her life for her separate use and without power of anticipation or if she shall then be dead shall pay the whole of such income to the settlor Provided always that any such notice in writing to be given by the settlor as aforesaid shall only apply to the income of the year in respect of which the notice is given remaining uninvested in the hands of the trustees at the time of the receipt by them of such notice and the future income to be received during that year And provided also that the settlor may exercise his power aforesaid as often as he may think fit but so that a separate notice shall be given in respect of each year or the residue of a year as the case may be."

After the death of the settlor the trustees were to pay the whole income to the said Helena Jane Murray for her separate use without power of anticipation, and after the death of the survivor the trust fund and the future income thereof were to be held in trust for such of them, Marion Murray, George Taylor, Sybil Irene Eleanor Taylor and Iris Florence Taylor as should attain twenty-one years of age or marry in equal shares. The investments forming the trust fund were set forth in the schedule.

Helena Jane Murray married the settlor on April 29, 1918. George Taylor died on November 9, 1917, and letters of administration of his estate were granted to the settlor on August 6, 1918.

On or about January 4, 1927, the Public Trustee received a notice signed by the settlor requiring all the income from the settled funds for the year ending December 31, 1927, to be paid as to one moiety to himself and as to the other moiety to his wife Mrs. Helena Jane Taylor, and a further notice signed by the settlor and his wife to collect all the income due to them during the year 1927 and to pay the same quarterly on March 31, June 30, September 30, and December 31 to the credit of an account with the Midland Bank.

On July 28, 1927, a receiving order in bankruptcy was made against the settlor, and on August 2, 1927, he was adjudicated bankrupt, and F. S. Salaman was appointed trustee in bankruptcy.

On or about January 7, 1928, the Public Trustee received a notice dated January 6 signed by F. S. Salaman stating that he had been advised that the power contained in the settlement to require one moiety of the income to be paid to the settlor had passed to him, and giving notice that he required the Public Trustee to pay him, one moiety of the income of the trust fund for the year to December 31, 1927, and also for the year 1928. The net annual income of the fund amounted to 206*l.* or thereabouts.

The Public Trustee took out this summons to determine whether a letter written by the settlor to the plaintiff on October 19, 1927, directing him to pay one moiety of the income to Mrs. Helena Taylor and to accumulate the remaining moiety of the income operated as a revocation of the notice given by the settlor on January 3, 1927, or was a valid exercise of the power so as to entitle Mrs. Taylor to one moiety of the income of the trust property, and whether the notice given by the defendant, the trustee in bankruptcy of the settlor, operated as a valid exercise of the said power so as to entitle the trustee of the property to any and what part of the income of the fund, and asking for the directions of the Court as to how he ought to deal with so much of the income of the moiety required to be paid to the settlor as was not paid to him prior to the receipt by the plaintiff of

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notice of the receiving order in bankruptcy, and how he should deal with the income for the year 1928.

By the Bankruptcy Act, 1914, s. 38: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . . shall comprise the following particulars:—

. . . . . .

(*b*) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."

Stafford Crossman for the plaintiff.

W. N. Stable for the settlor's trustee in bankruptcy. The capacity to exercise the power is vested in the trustee in bankruptcy, who can exercise it as to one-half for his own benefit, and one-half for the benefit of the settlor's wife. The only way in which the right of the trustee can be defeated is to read the words of the statute "for his sole benefit" or "exclusively for his benefit."

W. M. Hunt for the settlor's wife.

Tindale Davis for the settlor. The power is not one which the settlor can exercise for his own benefit—he can only exercise it for the joint benefit of himself and his wife. If it vested in the trustee in bankruptcy the trustee could give notices covering the next two or three years requiring the income to be paid to him. In the meantime the bankrupt might obtain his discharge, but he would not revest in himself the right to receive the income: *In re Mathieson* (1); *In the Goods of Turner*. (2)

Fergus D. Morton for the children of the settlor adopted the last argument.

W. N. Stable in reply. If the bankrupt exercises the power he must exercise the whole power, and whatever benefit he may get from its exercise passes to his trustee in bankruptcy:

(1) [1927] 1 Ch. 283. (2) (1886) 12 P. D. 18.

In re Cooper. (1) He cannot exercise the power so as to defeat the interest of the trustee in bankruptcy.

EVE J. By a settlement dated December 24, 1913, the bankrupt transferred certain funds into the name of the Public Trustee, upon trust to accumulate and invest the income thereof subject to a proviso, which was as follows: (His Lordship read the proviso and proceeded:] Helena Jane Murray was married to the settlor shortly after the date of the settlement, and during their joint lives the settlor has, under the earlier part of the proviso I have just read, power to suspend from time to time the operation of the trust for accumulation of the income and to direct payment thereof to himself and his wife in equal shares. He became bankrupt in August, 1927, and thereupon gave notice to the trustee, exercising the power, for the then current year. The question now raised is whether the power passed to the trustee in bankruptcy under sub-s. (*b*) of s. 38 of the Bankruptcy Act, 1914, and can be exercised by him for the benefit of the creditors.

The sub-section, so far as material, is as follows: Sect. 38. "The property of the bankrupt divisible among his creditors . . . . shall comprise the following particulars:—

. . . . . .

(*b*) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge. . . . ."

In other words, is this a power which at the date of the bankruptcy can properly be described as one which might have been exercised by the bankrupt for his own benefit? I do not think it is. The bankrupt cannot exercise it for his own benefit alone during his wife's lifetime. He can only exercise it for their mutual benefit; and although if he does exercise it any benefit he may derive therefrom will pass to the trustee, I do not think a power to appoint to oneself and another

(1) (1884) 27 Ch. D. 565.

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can properly be described as a power to appoint for one's own benefit. I think the operation of the sub-section is limited to powers capable of being exercised for the benefit of the bankrupt alone.

The questions raised by the summons as to the validity of attempts to exercise the power as to one moiety only must be answered in the negative.

Solicitors: *King, Wigg & Co.; G. R. Cran; Woolfe & Woolfe; Theodore Goddard & Co.*

H. L. L.

TOMLIN J.
1928
Oct. 18, 19.

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[1928. H. 1205.]

Right of Way—Evidence of User—User to pass from Highway to Highway—Motive in using Way irrelevant—Evidence of continuous User—Inference of Dedication.

Evidence of long public user, as of right, of a pathway or roadway for the purpose of passing from one public place to another, is not the less ground for inferring dedication because recreation may have been the sole motive of such user.

H. and W. were neighbouring freeholders, and the sites of their properties originally formed part of the D. estate. The property of H. was originally let on a long lease in 1878 to one G., together with a right of way over a rough road, of the nature of a timber road, leading up from the London Road towards the property and past the property to Box Hill. In 1916 H. acquired the freehold of the property, and took a conveyance of the roadway in 1924. W., without the consent of H., opened a small gate for pedestrians in the boundary fence. In the action H. claimed a declaration that he was the freeholder of the said roadway and an injunction to restrain W. from trespassing thereon. Evidence was given of public user between Box Hill and the London Road for purposes of pleasure:—

Held, that the evidence of public user led to a presumption that the land had been dedicated, and that the motive of such user was irrelevant.

Attorney-General v. *Antrobus* [1905] 2 Ch. 188 distinguished.

WITNESS ACTION.

In 1877, one Henry Peto Grissell built, at Mickleham, Surrey, on land which was at the time part of the Deepdene or Hope Estate, a house then intended to be called "Box Hill

House," and called at the time of this action "Pinehurst." In consideration of his building the house, the Hope Estate granted to him a lease of the site for ninety-nine years, together with a right of way over a certain cartway. This cartway had been in use, for well over fifty years before Grissell built the house, for the purpose of bringing down timber which had been felled on Box Hill; and in parts—especially in the lower part, where it joined the main road—it was very steep. It continued west in a straight line from a point near "Pinehurst" along the outside of the boundary fence of a house called "Juniper Hall," occupied at the time of this action by one McAndrew. The land to the south of the fence of "Juniper Hall"—including the cartway—belonged to the Hope Estate and was undeveloped. About the year 1828 the building, which, at the time of this action, was the lodge occupied by the plaintiff's gardener, was built for the Mickleham Coal Charity; and the timber track ran between this building and the boundary fence of "Juniper Hall," appearing on a map of 1848 as a private road.

Grissell did not make up the track, as he generally used a road known as the zigzag road for the purpose of driving to and from "Pinehurst." But at a spot where a mishap once occurred, he placed a gate which came to be known as the Target Gate.

Some time later a Mrs. Chaplin built on the site adjacent to "Pinehurst" a house called "Bencomb," and, at the same time, together with it, erected the boundary fence. Mrs. Chaplin sold "Bencomb" to a Mrs. Forbes, who, in turn, sold it to one Arthur Cox Pole, and from him it passed to William Whiteley, the defendant in the action.

In 1896 Arthur Corbet Hue, the plaintiff in the action, and two members of his family took an assignment of Grissell's lease of "Pinehurst," and later it became vested in the plaintiff as sole lessee. In December, 1916, the plaintiff acquired the freehold by purchasing the reversion, and in October, 1924, he took an assignment of the roadway leading from "Pinehurst" to the London Road from Dorking to Leatherhead, which roadway formed part of the said timber track.

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Either the plaintiff, or his predecessors in title, metalled a substantial portion of the track, so as to obtain a good approach to "Pinehurst."

None of the three previous owners of "Bencomb"—i.e., Mrs. Chaplin, Mrs. Forbes and Mr. Pole—had received from the Hope Estate a grant of a right of way over this roadway, which was separated from the boundary fence of "Bencomb" by a strip of land. Their access to it had been from a point to the south, where the zigzag road joined the main road between Dorking and Leatherhead. The defendant Whiteley, however, claimed the right of access to this roadway as a member of the public.

By a conveyance dated December 20, 1921, Lord Francis Hope, the tenant for life of the Deepdene Estate, conveyed to the National Trust about 70 acres at Box Hill to be held by that body "to the intent that such premises should forever thereafter be held as an open space for the recreation of the public pursuant to the powers of the National Trust Act or any statutory modification thereof."

The dispute which led to this action arose because the defendant, without having asked the consent of the plaintiff, opened in the boundary fence a small gate for pedestrians. In the action the plaintiff claimed against the defendant a declaration that the soil of the said roadway and of the said strip of land was the property of the plaintiff, and an injunction restraining the defendant, his servants and agents, from trespassing thereon. The defendant denied that the said roadway was a private road or the property of the plaintiff, and asserted that it was a common and public highway; and the onus of proof of this assertion being upon the defendant, evidence of public user was called on his behalf.

Gavin Simonds K.C. and *Gordon Alchin* for the defendant. There is clearly a terminus a quo and a terminus ad quem. There is evidence of user, and there is the essential feature of a public right of way. In *Attorney-General* v. *Antrobus* (1) the point of substance was the question whether English law

(1) [1905] 2 Ch. 188.

knows of such a thing as jus spatiandi. If the defendant has a right of way in this present case it extends to the two hedges: *Harvey* v. *Truro Rural District Council* (1) and *Attorney-General* v. *Esher Linoleum Co. Ld.* (2) The presumption is that the right of way extends from hedge to hedge. *Ramuz* v. *Southend Local Board.* (3)

F. K. Archer K.C. and *H. G. Robertson* for the plaintiff. The burden of proof that there is a right of way has not been discharged. That is the result of the evidence. Two grants were made at about the same time; one to the plaintiff's predecessor in title with a right of way along the road, and one to the defendant's predecessor in title, without such right of way. Possibly the road had been previously dedicated. But the position was very indefinite before the date of these grants. There is no evidence of a positive intention to dedicate. The question to be decided is whether there was express dedication. The chief point in the case is as to quantum of user; and it should here be held, on the authorities, that the user is capable of an explanation other than dedication. The acquiescence on the part of the Hope Estate is ambiguous. It may well be explained by the fact that that part of the country is a well known beauty spot. The proper inference is that the owner allowed the public to enjoy the road in a precarious manner, and never acquiesced in the user of it as a highway from one terminus to another. The fact of user is only an indication as to the intention of the landlord. The evidence of user here is not conclusive, because it is capable of an explanation at least as reasonable as the proof adduced. The question is not as to what the presumption is, but as to what is the proper inference to be drawn from all the facts that are before the Court.

Gavin Simonds K.C. in reply. The plaintiff is asking the Court to make out quite a new proposition of law, based on a misunderstanding of what was said by Farwell J. in *Attorney-General* v. *Antrobus.* (4) The salient fact is that there is here user of a way leading from one public highway to

(1) [1903] 2 Ch. 638.
(2) [1901] 2 Ch. 647.
(3) [1892] 8 Times L. R. 700.
(4) [1905] 2 Ch. 188.

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another. There is nothing in the judgment of Farwell J. to the effect that either the purpose of the journey or the nature of the ultimate destination is at all material. There is no reason to infer anything else than a dedication of the way by the owner. An intention to dedicate must here be assumed.

TOMLIN J. stated the facts and continued: The dispute has arisen because the defendant recently opened, in his fence adjoining the track the first part of which forms an approach road to the plaintiff's house "Pinehurst" from the public London Road, a small gate for pedestrians, without having asked the plaintiff's consent. The plaintiff says that he would have granted permission, but, as it was not asked, he objected; and this action is the result. The action involves somewhat difficult questions of fact and law, the short point being whether, over the "approach" road and beyond, there is a public footway, so that the defendant was justified in making an opening on to the footway. It is admitted that if the property does abut on a public footway, he is so entitled. Box Hill is a place to which the public have long resorted, either with or without a right. It is admitted that there is a public bridle road from Headley Road through Juniper Valley to Box Hill, and the question is whether there is a public footway eastward to a point in the bridle road. The track, in the precise form in which it is alleged to exist to-day, does not appear in the earlier editions of the Ordnance Map. But I am quite satisfied that at all material times the "Pinehurst" drive was continued eastward by a track which ran into the bridle road from the Headley Road to Box Hill.

The next point to be considered is whether there has been such user of the track as to lead to the inference that there is a public right of way. The evidence goes back over sixty years, and it is evidence of people who have used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way. On that evidence I should be bound to hold that there had been at some time a dedication to the public of this path as a public footpath.

It appears that of recent years the Hope Estate over which the track runs has been settled. But there is no evidence that there is no power to dedicate, nor has there been any evidence that the land was settled land sixty years ago. Upon the evidence I must conclude that the path, inasmuch as within living memory it has been used as of right, was dedicated.

Some part of Box Hill was at one time conveyed to the National Trust, which owns a right of way over this track. But this conveyance is recent and creates no difficulty.

The case of *Attorney-General* v. *Antrobus* (1) has been cited to show that the user here has been permissive. In that case Farwell J. held that, as the only user proved was that of the public crossing land, in order to get to a place where they had no right to be, and there to visit a monument over which there was no public right, the only proper inference was that the owner of the land and of the monument had allowed this user for the purpose of visiting the monument.

It is hard to see how that principle has any application to the present case, which is concerned with user to pass from one public way to another. Does it make any difference that it is desired to use the way for business or social purposes, or for walking to benefit health, or for a stroll through a beauty spot ? I cannot see that that has anything to do with the matter. A man passes from one point to another believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons as of right (i.e., believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arose in the case of *Attorney-General* v. *Antrobus*. (1)

I must conclude that there is in fact a public footpath from the London Road past the Target Gate to the bridle road. The plaintiff does not dispute that the defendant would be justified in constructing a gate opening on to the public footpath ; and there was no ground for complaint by

(1) [1905] 2 Ch. 188.

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the plaintiff as to the position of the gateway, or as to the passage of the defendant through the gateway on to the road.

I desire to state in conclusion that although I have here decided that there is a public right of way, that decision binds no one save the parties to this action.

Solicitors: *Hopgood, Mills, Steele & Lonsdale; Roche, Son & Neale.*

A. R. T.

ASTBURY J. 1929 Jan. 16.

In re MELLOR.

PORTER *v.* HINDSLEY.

[1928. M. 3147.]

Will—Construction—Home-made Will—Direction to pay Debts—Gift of limited Interest in House—Gift of "remainder of any monies"—No other residuary Gift—Ambit of Gift—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23).

By a home-made will of 1928 a testator, after expressly directing payment of his debts and giving (inter alia) a limited interest in his (freehold) residence to his housekeeper, gave "the remainder of any monies" to nine legatees including the housekeeper.

There was no other residuary gift.

Held, that having regard to the express direction to pay debts the gift of "the remainder of any monies" could not be construed in the strict sense of the word "monies" but must include all property liable to the payment of debts.

Stocks v. *Barré* (1859) Joh. 54, 56 applied.

Held therefore, that the residuary property both real and personal passed by the gift either—

(*a*) on the ground that under the Administration of Estates Act, 1925, real and personal estate were now pari passu liable to the payment of debts, or

(*b*) because when once it was clear that the word "monies" was not used in its strict sense the Court could give effect to the testator's manifest intention to include the whole of his property in the gift.

In re Taylor [1923] 1 Ch. 99, 108, 110 applied.

ORIGINATING SUMMONS.

By a home-made will dated April 2, 1928, the testator, after describing himself as of Victoria Street, Goole, Yorkshire,

appointed the plaintiff executor and directed all his debts and funeral expenses to be paid as soon as conveniently might be after his decease. After certain specific bequests the will proceeded: "All my household effects I leave to my housekeeper Jane Rhodes, also a saving certificate value 25*l.*, also option of living at above address subject to paying rates of same, on condition that Jane Rhodes is still in my employ at death. The remainder of any monies shall be equally divided between the following persons"—here followed the names of nine persons ending with Jane Rhodes—"The last two named persons if living at my death and in the event of Jane Rhodes still being in my employ."

The testator died on April 6, 1928, and the plaintiff obtained probate on May 5.

The testator's property consisted of (*a*) his freehold residence, 30 Victoria Street, Goole, (*b*) the chattels and furniture therein, (*c*) railway stock, (*d*) War savings certificates (including a 25*l.* certificate and Government stocks, (*e*) cash at bank.

The testator, a widower, left two children who were included in the nine residuary legatees, all of whom survived him.

On November 2, 1928, the executor issued this summons to determine (inter alia) whether the bequest of "the remainder of any monies" passed (*a*) the freehold house, subject to Jane Rhodes' interest, (*b*) the residuary personal estate, or whether there was a partial intestacy.

Jopling for the executor.

Turnbull for the next of kin. Apart from a context "money" means cash. There is here no context to extend it to residuary personalty, still less to realty. There is no reported case in which "money" has been held to pass realty: *In re Emerson.* (1)

Henry Johnston for the housekeeper. In *In re Emerson* (1) there was no express direction to pay debts followed by a gift of "the remainder of any monies." In such a case the Court construes the word "monies" as including all property liable to the payment of debts: *Stocks* v. *Barré* (2), and under

(1) Ante, pp. 128, 130, 131. (2) Joh. 54, 56.

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the Administration of Estates Act, 1925, real and personal estate are now pari passu so liable.

There is however no need to rely on the recent legislation, as when once the Court finds that "money" is not used in the strict sense, it can give effect to the testator's obvious intention: *In re Taylor*. (1)

The matter is dealt with in Hawkins on Wills, 3rd ed., pp. 64, 65.

J. A. Wolfe and *Mendel* for the residuary legatees other than the next of kin and the housekeeper, adopted this argument.

ASTBURY J. [after stating the facts and dealing with another question:] The remaining question is perhaps more interesting. Is the residuary gift to be treated as a gift of all property not previously disposed of and does it include the freehold house, subject to the housekeeper's interest?

Apart from authority I should have had no doubt on reading this home-made will that the testator intended to dispose of the whole of his property.

In *Stocks* v. *Barré* (2) Wood V.-C. said: "In this case, the general rule of construction must prevail—namely, that, where there is no other gift of the residue of the testator's personal estate, and there is a bequest of any 'money' which may remain after payment of his debts, the Court must construe the word 'money' as including the general residue of the personal estate not specifically bequeathed, and which by law is liable to the payment of his debts."

Under the Administration of Estates Act, 1925, real and personal estate are now pari passu liable to the payment of debts.

Now in this will the testator after directing payment of his debts makes a limited gift of his freehold residence and other specific gifts. He then gives "the remainder of any monies" to nine persons including his housekeeper and his two children. As far as intention is concerned he certainly meant to include the whole of his property in this gift. Under Wood V.-C.'s

(1) [1923] 1 Ch. 99, 108, 110. (2) Joh. 54, 56.

rule a gift of the remainder of money remaining after payment of debts, in the absence of any other residuary gift, passes the whole property liable to the payment of debts, and that now includes real estate.

But in the present case it is not necessary to call in aid the recent legislation. A testator's language may show that he is not using "money" in the strict sense, but intends it to include the whole of his property, whether real or personal. Here he is obviously not using "money" in the strict sense, and his manifest intention to include the whole of his property may be given effect to: *In re Taylor.* (1)

The whole of his property therefore, both real and personal, not specifically disposed of passes under the gift of "the remainder of any monies."

Solicitors: *Williamson, Hill & Co., for Bentley, Gundill & Co., Goole.*

G. R. A.

PEACHY *v.* YOUNG.

[1927. P. 1576.]

Lease—Mortgage by Sub-demise—Usual Covenants to repair in Head Lease—Nominal Reversion in Mortgagor—Covenant in Mortgage by Mortgagor for further Assurance if required of outstanding nominal Reversion—Power of Sale in Mortgage—Assignee of Mortgage Term—Effect of Law of Property Act, 1925, *on Covenants in Head Lease—Liability of Assignee of Mortgage Term for Covenant to repair in Head Lease—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part II.; paras.* 3, 6 (*d*), 7 *and* 8—*Law of Property (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*

A. in 1926 had become entitled to a sub-term in certain mortgaged leasehold premises acquired by purchase by a predecessor in title from a mortgagee.

The original mortgage was made in 1848, and contained a covenant by the then mortgagor with the then mortgagee his executors administrators and assigns (inter alia) for further assurance of the nominal reversion in the three outstanding days in the head lease thereby

(1) [1923] 1 Ch. 99, 108, 110.

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mortgaged, if required. In the head lease were certain covenants by the lessee for repair of the premises. The freehold of the demised property ultimately became absolutely vested in the plaintiff for an estate in fee simple. A. had gone into possession of the mortgaged premises, but relinquished such possession before the trial of the action.

The plaintiff alleged that there had been a breach of the covenant to repair contained in the head lease, and claimed (inter alia) damages against A. It appeared that the nominal reversion in the head lease had never been got in by any one, and A. denied that, as there was no privity of estate between him and the plaintiff, he could be held liable under the repairing covenant contained in the head lease. It was alleged, however, by the plaintiff that having regard to the fact that A., by reason of the covenant for further assurance contained in the mortgage, was a person "*entitled to require a legal estate to be conveyed to or otherwise vested in him*" under Sch. I., Part II., para. 3, of the Law of Property Act, 1925, such legal estate, namely, the nominal reversion, vested in him by para. 6 (*d*) of Part II. of Sch. I., and rendered him liable on the repairing covenants contained in the head lease :—

Held, that on the facts of the case, A. was liable by reason of the operation of Sch. I., Part II., paras. 3 and 6 (*d*), of the Law of Property Act, 1925, as a person entitled to require a legal estate to be conveyed to or otherwise vested in him ; and, further, that he had not availed himself of the provisions of the Schedule to the Law of Property (Amendment) Act, 1926, enabling persons to disclaim the vesting of any legal estate affected by onerous covenants.

ACTION.

By a lease dated July 8, 1848, and made between one Samuel Bamford, the lessor, of the one part, and one Benjamin W. Pearce, the lessee, of the other part, a piece or parcel of land situate at Barking in the county of Essex together with the ten messuages or tenements erected or being erected thereon (and now known as Nos. 106 to 124 Wakering Road, Barking) were demised by the lessor to the lessee his executors administrators and assigns for the term of eighty-one years from December 25, 1847, at the yearly ground rent of 25*l.* per annum. By that lease the lessee covenanted for himself his heirs executors administrators and assigns (inter alia) that he would at all times during the said term well and sufficiently repair uphold support amend and keep clean with all requisite painting . . . . and in good repair and condition in all respects the said messuages or tenements and premises thereby demised with the appurtenances thereof. And in the lease there was further

contained a condition (inter alia) that in case of any breach or non-performance of the covenants therein contained and which by the said lessee his executors administrators and assigns ought to be observed performed fulfilled or kept, ... then it should be lawful for the lessor and for the person or persons entitled in reversion to enter upon the demised premises or any part thereof and to take possession thereof, and repossess and enjoy as in his and their former estate.

By an indenture of mortgage dated July 20, 1848, the lessee Pearce mortgaged his leasehold interest in the term by way of sub-demise to one William Williamson his executors administrators and assigns for the term of eighty years and a half less three days from June 24, 1848. In the mortgage was a covenant by the mortgagor Pearce for himself his heirs executors administrators and assigns with the mortgagee Williamson his executors administrators and assigns that immediately after default as therein mentioned in payment of the sums of money thereby secured, it should be lawful for the mortgagee his executors administrators or assigns " whether in or out of possession of the [mortgaged] premises of his and their own authority to make sale and absolutely dispose of the said premises with the appurtenances for the residue of the said term hereby demised or the whole of the said term of years granted by the before recited Indenture of Lease [the lease of July 8, 1848]. . . . ."

There was a further covenant in the mortgage in the following terms: " And further that he the said Benjamin Workman Pearce his executors and administrators and all and every other person or persons lawfully claiming or to claim any estate right title or interest of in to or out of the same premises every or any part thereof by from or under him them or any of them shall and will from time to time and at all times hereafter during the residue of the first mentioned term [the head lease] at the request of the said William Williamson his executors administrators and assigns and at the costs and charges in the law of the said trust estate [trust of the reversion] make do and execute . . . . all and every such further and other lawful and reasonable acts deeds conveyances

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assignments and assurances in the law for the further better more perfectly and absolutely demising or assigning and assuring the aforesaid premises unto the said William Williamson his executors administrators and assigns for all the then residue and remainder of the term of years hereby granted [sub-term] or if required of the said first mentioned term of years [head term] upon the trusts herein declared as by the said William Williamson his executors administrators and assigns or his or their counsel shall be reasonably devised advised or required."

By a deed dated September 1, 1856, the mortgagee Williamson assigned his term to one W. J. Rye.

After divers mesne assignments, acts and assurances in the law all the premises comprised in the lease of July 8, 1848, were ultimately by a deed dated July 28, 1893 [at which date the premises were known as 13 to 31 (odd numbers inclusive) New Street, Church Road, Barking] assigned by one W. Witham in whom the same were then vested to the defendant for the residue then unexpired of the said term of eighty years and a half less three days granted by the mortgage of July 20, 1848, and subject to the rent and covenants and conditions of the lease of July 8, 1848.

After divers assurances, events and acts in the law, the freehold reversion in the premises demised by the lease of July 8, 1848, ultimately became by a deed of partition dated May 9, 1900, absolutely vested in the plaintiff Mrs. Jessie J. Peachy in fee simple. Shortly after the execution of the assignment of July 28, 1893, the defendant entered into possession of the mortgaged premises.

It was alleged by the plaintiff in her statement of claim that the defendant had failed to carry out the covenants for repair contained in the head lease, and she claimed possession of the premises, mesne profits and damages for breach of covenant.

Before the matter however came to trial the defendant gave up possession of the premises, and the amount of the mesne profits was agreed on. With regard to the plaintiff's claim for damages, the defendant denied that the term

created by the head lease ever became or was vested in him and alleged that no privity of estate existed or ever did exist between the plaintiff and the defendant in the premises.

The question therefore arose whether, having regard to the wording of the covenant for further assurance contained in the mortgage of July 20, 1848, the defendant had the right to call for the three outstanding days; and if so whether by virtue of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, these three days had become vested in the defendant so as to render him liable to the plaintiff on the repairing covenants contained in the head lease.

C. A. Bennett K.C. and *Hon. S. O. Henn Collins* (*A. T. Denning* with them) for the plaintiff. The position of the defendant and his liability under these covenants has been altered by the new real property legislation: see the Law of Property Act, 1925. It is submitted the defendant falls within the First Schedule, Part II., para. 3, of that Act. He is entitled to require a legal estate, that is the three outstanding days of the mortgage term to be vested in him; and para. 6 (*d*) vests it in him. Further he has not taken advantage of the right to disclaim provided for in the Schedule to the Law of Property (Amendment) Act, 1926, which added a new paragraph (*m*) to para. 7 of Part II. of the First Schedule to the Law of Property Act, 1925. Reliance is also placed on paras. 7 and 8. The defendant is liable to the plaintiff on the covenant for repairs contained in the head lease.

Gover K.C. and *E. Foà* for the defendant. The liability of the defendant under the new Law of Property Act is disputed. There is no privity of estate between the plaintiff and the defendant. The question is one of principle and of construction. Throughout all the transactions affecting the mortgage of the lease, the sub-term thereby created only passed, leaving the three days still outstanding, and this continued until 1926. Then the new Act of 1925 raised doubts as to the position of persons entitled to call for outstanding legal estates, but it is submitted it created no privity

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of estate. The question is, can this Act be construed so as to impose on persons in the position of the defendant serious obligations? It is submitted not.

Further this statute cannot have a retrospective operation: see observations of Lindley L.J. in *Lauri* v. *Renad* (1); *In re School Board Election for Pulborough* (2) for observations of Lopes and Davey L.JJ., which are in our favour. If the plaintiff's contention is correct, it would have this operation. We rely also on para. 2 of Part II. of the First Schedule, by reason of the words "merge or be extinguished." If this legal estate, to which it is alleged the defendant is entitled, became vested under the Act, it would be "merged or extinguished." Also reliance is placed on para. 7 (*a*) of Part II.

C. A. Bennett K.C. in reply.

TOMLIN J. This is an action by a lessor for recovery of possession and mesne profits and damages for breach of covenant to repair. Before the matter came to trial, possession was given up and the amount of the mesne profits was agreed, and the only question remaining is as to the liability of the defendant under the covenant to repair. The question is not merely a question of quantum, but a question of liability, and it arises in this way. The defendant is the owner of a sub-term acquired by purchase by a predecessor in title from a mortgagee, and the title is shortly this: On July 8, 1848, one Samuel Bamford demised the property, which consists of ten houses in Barking in the county of Essex (the houses, I may mention, at the date of the original lease not having been built), to one B. W. Pearce for eighty-one years from Christmas, 1847, and the lease contained a covenant to repair, the terms of which admittedly have not been complied with. On July 20, 1848, Pearce mortgaged by sub-demise to one William Williamson for eighty years and half a year less three days from June 24, 1848, so that there was left a reversion of three days in the mortgagor Pearce. The mortgage contained a covenant for title and further assurance

(1) [1892] 3 Ch. 402, 421. (2) [1894] 1 Q. B. 725, 737, 741.

in these terms: "And further that he the said Benjamin Workman Pearce his executors and administrators and all and every other person or persons lawfully claiming or to claim any estate right title or interest of in to or out of the same premises every or any part thereof by from or under him them or any of them shall and will from time to time and at all times hereafter during the residue of the first mentioned term "—that is the head lease—" at the request of the said William Williamson "—that is the mortgagee—" his executors administrators and assigns and at the costs and charges in the law of the said trust estate "—that means the trust of the reversion—" make do and execute or cause or procure to be made done and executed all and every such further and other lawful and reasonable acts deeds conveyances assignments and assurances in the law for the further better more perfectly and absolutely demising or assigning and assuring the aforesaid premises unto the said William Williamson his executors administrators and assigns for all the then residue and remainder of the term of years hereby granted "—that is the sub-term—" or if required of the said first mentioned term of years "—that is the head term—" upon the trusts herein declared as by the said William Williamson his executors administrators and assigns or his or their counsel shall be reasonably devised advised or required." So the position under that document was this, that Williamson, the mortgagee, held the sub-term as security for his mortgage debt, Pearce retained the remaining three days of the head term vested in him upon trust by way of further security, with an obligation to assure those three days to Williamson or his successors if required. To-day the freehold is admitted to be vested in the plaintiff.

On September 1, 1856, Williamson sold his term to one W. J. Rye under the power of sale in the mortgage; and thereupon, of course, Rye became absolutely entitled to the sub-term and entitled to the benefit of the reversion of the three days, including the right to require that those three days be transferred to him. It is unnecessary to say that neither Rye nor any of his successors in title ever claimed

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an assurance of those three days, inasmuch as to have done so, would have rendered them directly liable by privity of estate to the freeholders. Then there were a number of intermediate dealings with the sub-term; and ultimately on July 28, 1893, the sub-term was sold to the present defendant.

Now if the law had remained to-day as it once was—namely, before January 1, 1926—the position would have been clear, there was no contractual liability between the plaintiff and the defendant in respect of repairs; the only liability that there could exist between them, would be a liability by reason of privity of estate, and there was in fact no privity of estate between them, because the three days reversion in the sub-term remained vested in Pearce or his successors; and had never been got in by the defendant. So that there would have been no liability on the part of the defendant under the covenant for repair. That was the position before the Law of Property Act, 1925, came into force.

It is said by the plaintiff that that Act has altered the law, and has fixed the defendant with a liability in respect of repairs which he would not have otherwise been under. It therefore becomes necessary to consider the material provisions of the Law of Property Act, 1925. The material provisions of that Act are to be found in the First Schedule, Part II. The First Schedule deals with Transitional Provisions, and Part I. of that Schedule relates to conversion of certain existing legal estates into equitable interests, with which however this case is not concerned. Part II. deals with the Vesting of Legal Estates, and the paragraphs on which the plaintiff relies in that Part are paras. 3, 6 (*d*), 7 and 8. Para. 3, so far as it is material, is in these terms: "Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided." Then under para. 6, it is provided that: "Under the provisions of this Part of this Schedule, the legal estate

affected (namely, any estate which a person is entitled to require to be vested in him as aforesaid) shall vest as follows: (*d*) In any case to which the foregoing sub-paragraphs "—that is (*a*) (*b*) and (*c*) which are not material—"do not apply, the legal estate vested shall vest in the person of full age who, immediately after the commencement of this Act, is entitled (subject or not to the payment of costs and any customary payments) to require the legal estate to be vested in him, but subject to any mortgage term subsisting or created by this Act."

The effect of paras. 3 and 6 (*d*), is said to be that inasmuch as at the commencement of the Act, there was an outstanding legal estate, of which the defendant was entitled to require a conveyance, para. 3 operated on that legal estate and vested it in him; he being under para. 6 (*d*) a person "of full age who, immediately after the commencement of this Act, is entitled . . . . to require the legal estate to be vested in him. . . . ." Para. 7 is as follows: "Nothing in this Part of this Schedule shall operate—(*a*) To vest in a mortgagee of a term of years absolute any nominal leasehold reversion which is held in trust for him subject to redemption." Para. 8 says: "Any legal estate acquired by virtue of this Part of this Schedule shall be held upon the trusts and subject to the powers, provisions, rents, covenants, conditions, rights of redemption (as respects terms of years absolute) and other rights, burdens and obligations, if any, upon or subject to which the estate acquired ought to be held." So that at any rate the effect of the vesting in the defendant, if in fact these paragraphs did operate to vest it in him, is to leave him with the head term subject to the covenants contained in the lease of the head term; and to render him liable directly to the freeholder by privity of estate for breach of those covenants. Reading the language of paras. 3 and 6 (*d*), it seems to me, if those paragraphs stood alone, impossible to come to any other conclusion than that they apply. The facts are precisely within the words: "Where immediately after the commencement of this Act any person is entitled . . . . to require any legal estate . . . . to be conveyed to or otherwise vested in him. . . . ." It seems to me to be impossible

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to say that on the covenants contained in the original mortgage, the defendant, as successor in title of the original mortgagee, is not entitled to require the legal estate in the head term to be conveyed to him.

But it is said on behalf of the defendant that there are at any rate two possible grounds of escape from that situation. He refers, first of all, to Part II., para. 2, which is in these terms: "Where immediately after the commencement of this Act any owner of a legal estate is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any other legal estate in the same land to be surrendered, released or conveyed to him so as to merge or be extinguished, the last-mentioned estate shall by virtue of this Part of this Schedule be extinguished, but without prejudice to any protection which would have been afforded to him had that estate remained subsisting." It is submitted on behalf of the defendant that the case falls under that paragraph, and that under that paragraph he still has the protection which the outstanding estate afforded him; although under the paragraph the estate has been extinguished.

Now it is quite true that this is a case where an owner of a legal estate, that is the owner of the sub-term, was entitled to require another legal estate—namely, the legal estate in the head term—to be conveyed to him. Up to that point the language seems apt; but the difficulty arises in the words "so as to merge or be extinguished." It is plain that where the owner of a legal estate is entitled to require the conveyance to him of a higher estate; he is not entitled to require it to be conveyed to him so as to merge or be extinguished. What is merged or extinguished upon the conveyance of the higher estate is the lesser estate which he already holds; and this paragraph seems to be limited to those cases where the owner of a higher estate can call for the conveyance of a lower estate which, if conveyed to him, would merge or be extinguished in the higher estate. That being the language of the paragraph, it seems to me impossible to say that it applies to this case. I think, therefore, that that point does not avail the defendant.

His second point is on para. 7 (*a*), which I have already read, and which provides: "Nothing in this Part of this Schedule shall operate (*a*) To vest in a mortgagee of a term of years absolute any nominal leasehold reversion which is held in trust for him subject to redemption." I think it is plain upon the definition of "mortgagee" contained in the Act, that "mortgagee" would include an absolute assignee of the mortgaged term acquiring by purchase under the power of sale or one of his successors in title; and the defendant is therefore within the definition of "mortgagee."

The question is whether there is "any nominal leasehold reversion which is held in trust for him subject to redemption"? Unhappily for him the fact that he traces his title through a purchaser of the term under the mortgagee's power of sale, a transaction which obliterates the right of redemption, puts him in such a position that he cannot now say that there is any nominal leasehold reversion which is held in trust for him "subject to redemption"; and I do not see my way to put any unnatural construction upon the language, merely to bring this case (which I cannot help thinking is a casus omissus), within the operation of the Act. That it was a casus omissus, seems to have been recognized by the Legislature; and an attempt has been made (whether one which may be regarded as a happy one or not, I am not concerned with) to remedy the defect. By the Law of Property (Amendment) Act, 1926, it is provided, among the minor amendments which occupy the larger part of that Act, one to Sch. I., Part II., of the Law of Property Act, 1925, as follows: "At the end of paragraph 7 there shall be inserted the following paragraph:—(*m*) 'To vest in any person any legal estate affected by any rent covenants or conditions if, before any proceedings are commenced in respect of the rent covenants or conditions, and before any conveyance of the legal estate or dealing therewith inter vivos is effected, he or his personal representatives disclaim it in writing signed by him or them.'" How far all others who, like this defendant and his predecessor in title, thought themselves happily protected by an outstanding legal estate from any

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liability to the freeholder in respect of the covenants of the head lease, may have spent their time in studying these Acts and ascertained that their immunity has ceased; or that by signing some disclaimer, such as is contemplated by this amendment, they could maintain their immunity; I am not aware. I am only aware that this particular defendant, whether he was conscious or not of the legislation which was passed by Parliament, did not in fact disclaim, and, therefore, cannot take the benefit of that amendment.

The result I think must be, therefore, that, so far as this matter is concerned, I must declare that the defendant is liable to the plaintiff for damages under the covenant to repair contained in the head lease; and direct an inquiry in the appropriate form.

Solicitors: *Vallance & Vallance; Kingsford, Dorman & Co., for Hatten, Asplin & Hayter, Barking.*

A. R. T.

CHANEY *v.* MACLOW.

[1927. C. 2069.]

C. A.
1928
MAUGHAM J.
June 21, 22; *July* 3.
C. A.
Dec. 5.

Vendor and Purchaser—Sale of Freeholds by Auction—Refusal of highest Bidder to sign Memorandum of Contract—Implied Agency of Auctioneer to sign—Duration of Authority—Signature at Auctioneer's Office after Completion of Sale—Repudiation by Purchaser after Signature.

An auctioneer who has knocked down property to the highest bidder at a sale has authority to sign a memorandum of the contract to satisfy the Law of Property Act, 1925, s. 40 (substantially re-enacting part of s. 4 of the Statute of Frauds), not only while he is in the sale-room but during any period within which his signature of the memorandum can reasonably be held to be part of the transaction of sale.

At a sale by auction of freeholds, a dwelling-house was put up and knocked down to the defendant who, upon being asked by the auctioneer's clerk, refused to sign the memorandum on the particulars on the ground that by one of the conditions of sale, which he had not noticed until just previously, the purchaser was required to pay certain road-making charges. He left the sale-room without interviewing the auctioneer or repudiating the contract. The auctioneer then wrote the defendant's name in the particulars before him, and returned to his office after the sale, where, after ascertaining that the defendant had not called to pay the deposit or sign the memorandum, he signed it himself as agent for the purchaser. The defendant a week later repudiated the contract. The Court having found, in an action of specific performance by the vendor, that the defendant was the highest bidder for the property:—

Held, by Maugham J., that in the circumstances the memorandum signed by the auctioneer was sufficient to satisfy s. 40 of the Law of Property Act, 1925. The purchaser not having repudiated the contract in the sale-room, the auctioneer was justified in assuming that he would withdraw his protest and pay the deposit, and in giving him an opportunity to do so at his (the auctioneer's) own office. Upon his failure to do so later in the same day, the auctioneer was entitled to sign the memorandum as part of the transaction of sale.

On appeal:—

Held, by the Court of Appeal, (1.) that the auctioneer had authority to sign on behalf of the purchaser a memorandum to satisfy the Law of Property Act, 1925, s. 40; and (2.) that having regard to the finding of Maugham J. that the auctioneer's signature of the memorandum at his own office after the sale could fairly be held to be part of the transaction of sale, the authority still persisted at the time of such signature.

Mews v. *Carr* (1856) 1 H. & N. 484 and *Bell* v. *Balls* [1897] 1 Ch. 663 discussed and distinguished.

WITNESS ACTION.

The plaintiff, as mortgagee of the property, instructed Mr. J. C. Ewin, carrying on business as Messrs. Brown & Ewin,

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auctioneers, of 218 East India Dock Road, to put up for sale a freehold dwelling-house known as "Tiverton," Durham Road, Southchurch, in the county borough of Southend-on-Sea. The auctioneer put up the property for sale at the London Auction Mart, subject to the National Conditions of Sale, 1925, and certain special conditions, on April 29, 1927, and it was knocked down to the defendant for 650*l*. The defendant would not admit that he was the highest bidder and refused to give his name to the auctioneer's clerk, or to sign the memorandum of agreement on the particulars, on the ground that he had not until then noticed a condition of sale requiring the purchaser to pay 56*l*. for road-making charges. The auctioneer knew the defendant by sight and his surname, which he entered on the particulars, but not his Christian name. The memorandum was filled up and signed by Mr. Ewin as agent for the defendant at his office at 218 East India Dock Road, which was about three miles from the auction-room, about two hours after the sale, after ascertaining that the defendant had not called or paid the deposit. The defendant having refused to proceed with the purchase, and having denied that he was the highest bidder, the plaintiff brought this action for specific performance. The evidence is dealt with in the judgment. The question of law argued was whether in the circumstances the memorandum so signed by the auctioneers was sufficient to bind the defendant as purchaser, as being part of the transaction of sale.

The action came on for hearing before Maugham J. on June 21, 1928.

H. B. Vaisey K.C. and *G. P. Slade* for the plaintiff. The defendant was the highest bidder for the property at the sale, and he never repudiated the contract in the sale-room; he only refused to sign. Mr. Ewin had implied authority in the circumstances to sign as agent for the purchaser at his own office some two hours after the sale: *Bell* v. *Balls* (1), where the Court held that the auctioneer had no authority to sign a week after the sale, is distinguishable. Here there was no

(1) [1897] 1 Ch. 663.

definite repudiation by the defendant until after the auctioneer had signed the memorandum. An opportunity was given to the defendant to come to Mr. Ewin's office to sign and pay the deposit, but as he did not do either, Mr. Ewin was entitled to sign. It was part of the circumstances of the sale: *Van Praagh* v. *Everidge*. (1) That decision, it is true, was reversed in the Court of Appeal, but on a different point—namely, that the contract sought to be enforced was not the same contract as the parties had entered into.

[They also referred to *Sims* v. *Landray*. (2)]

Bennett K.C. and *W. A. Jolly* for the defendant. The contract is made at a sale by auction the moment the hammer falls on the last bid, but it cannot be sued upon until it is put into writing. Here the authority of the auctioneer had ceased. The memorandum could not be signed by him after the purchaser had done something to indicate clearly that he was not the last bidder, and that he refused to sign the contract. The auctioneer is no longer the purchaser's agent after the sale is over: *Bell* v. *Balls* (3); *Mews* v. *Carr*. (4). *Sims* v. *Landray* (2) is distinguishable from the present case. It turned not on any implied but on express authority given by the defendant to the auctioneer's clerk to insert his name in the memorandum. There the defendant stood by while the clerk wrote his name down. The rule that the auctioneer may sign so as to bind the purchaser after he has repudiated the contract is an exception to the ordinary law, and the exception must be confined within strict limits, i.e. the acts of the auctioneer in the sale-room at the time of or immediately after the sale. Here the auctioneer did not sign the memorandum until some time after he had returned to his office in the East India Dock Road, over three miles distant from the sale-room, and his authority had ceased. The case is within the authority of *Bell* v. *Balls*. (3)

Vaisey K.C. in reply.

Cur. adv. vult.

(1) [1902] 2 Ch. 266; [1903] 1 Ch. 434.
(2) [1894] 2 Ch. 318
(3) [1897] 1 Ch. 663.
(4) 1 H. & N. 484.

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July 3. MAUGHAM J. This is an action for specific performance of an agreement dated April 29, 1927, the terms of which are contained in a memorandum in writing of that date signed by Mr. J. C. Ewin as agent for the defendant. Mr. J. C. Ewin is an auctioneer carrying on business as Brown & Ewin at 218 East India Dock Road, Poplar. The sale is alleged to have been effected at a public auction sale conducted by Mr. Ewin at the London Auction Mart, and he purported in signing the memorandum to be exercising the implied authority of the auctioneer. There were thirteen lots put up for sale on that day, and the property the subject of the present dispute was Lot 3.

In effect there are two defences to the action. The first is that the defendant was not the last bidder for Lot 3 at the auction sale and that the property was therefore not properly knocked down to him. The second is that there is no memorandum to satisfy s. 40 of the Law of Property Act, which replaces s. 4 of the Statute of Frauds, the main ground being that Mr. Ewin had according to the defendant's contention no authority to sign the memorandum in the circumstances of the case. Some half a dozen witnesses were called on behalf of the plaintiff and the defendant himself went into the box in support of his defence. There is a marked conflict of fact between the latter's evidence and that of the witnesses for the plaintiff; but I have no doubt at all as to the right conclusion I should draw in relation to the facts and I will now proceed to state my findings as to what took place.

Mr. Ewin is an experienced auctioneer who has been in business for a good many years. He employs a number of clerks, and three of them, Mr. Herbert George Doughty, his chief clerk, and Mr. Harry Pearson Doughty, and Mr. John Robert Rodger, attended the auction with Mr. Ewin. Mr. Ewin, of course, was in the rostrum and his clerks were at a table or desk in the auction-room on either side of the rostrum. Mr. Ewin had before him an interleaved copy of the auction particulars, and as bids were made he noted down in the particulars the prices bid; and when lots were sold

he noted down the name of the purchaser. When Lot 3 was put up he followed this practice. The defendant admits that he bid for Lot 3, but alleges that he bid only up to 500*l.* or 510*l.* I am quite satisfied that he went on bidding and that after 635*l.* was bid, he bid 650*l.*, and that the lot was knocked down to him. Mr. Ewin turned to Mr. Herbert Doughty, his principal clerk, who was on his right, and said: "Who is the buyer?" and was told that it was Maclow, the defendant; and Mr. Ewin at once wrote this name down in the particulars before him. Mr. Ewin then proceeded to sell the other lots. Mr. Rodger, one of the junior clerks, in pursuance of his ordinary duty, went at once with a small piece of paper to the defendant and said to him: "Who is the purchaser and what is his name and address?" The defendant is a surveyor who often buys and sells property in and near London, and he is a well known bidder at the Auction Mart. He had not had a copy of the conditions until he entered the room, and he had apparently not observed that special condition No. 5 relating to Lot 3 stated that the property was sold subject to the payment of 56*l.* 0*s.* 1*d.* with interest, being the amount due to the Corporation of Southend-on-Sea in regard to some road-making expenses. Mr. Arthur Clark, an estate agent and a perfectly independent witness, who was attending the sale and sitting within a foot or two of the defendant, asked the defendant when the property was knocked down to him: "Have you seen the property?" and another man sitting close by said to the defendant: "Have you seen the conditions?" The defendant thereupon turned to the conditions and was looking at them when Mr. Rodger came to him with the request for his name and address. The defendant said: "Wait a moment." He then read special condition No. 5 and he said in a loud tone: "What? 56*l.* for road-making charges. I protest. I won't sign the contract." Mr. Rodger then asked him if he would go and see Mr. Ewin after the sale. The defendant did not reply. In the meantime Mr. Ewin was proceeding with the sale of the other lots. At the conclusion of the sale the defendant left the room without going to see Mr. Ewin, although, of course,

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he knew perfectly well that Lot 3 had been knocked down to him and that he was expected to pay a deposit and to sign the usual memorandum or contract of sale. I should pause here to say that not only did Mr. Ewin distinctly see the defendant make the final bid, but Mr. Herbert Doughty, Mr. Rodger, Mr. Arthur Clark and Mr. Arthur Peacock, who was the clerk to the solicitors for the vendors attending the sale on their behalf, are all of them certain that the bid was made by the defendant. In the witness box he said that after he had bid up to 500*l.* or 510*l.* he began to read the particulars and that he raised his head slowly from the auction particulars after the penultimate bid of 635*l.* or 640*l.* had been made, and that the auctioneer took his raising his head as a bid and knocked the property down to him at once without inviting a bid from any other person.

I have no doubt whatever that this is quite untrue and that the defendant deliberately bid for the property 650*l.* and had it knocked down to him. The defendant, knowing that the property had been knocked down to him, did not state at the time that there had been a mistake and that he had never made the final bid of 650*l.* If he had done so it would have been the duty of the auctioneer at once to deal with the matter in some way, possibly by putting up the lot again. As I have already said, the defendant did not wait to see the auctioneer. In these circumstances Mr. Ewin at the completion of the sale left the Auction Mart about 3.30 and got back to his office, which is at some distance from the Auction Mart, at about 4.30. He was told by Mr. Rodger that the defendant had said that he would not sign the contract because of the condition relating to the road-making charges, and that he had not come to the office. Mr. Ewin thereupon without further delay signed the contract or memorandum as agent for the defendant, the memorandum having previously been filled up by Mr. Herbert Doughty on the footing that the defendant, notwithstanding his protest, would probably think better of it and would come and pay his deposit in due course. The memorandum therefore contains a recital that the defendant had paid into the hands of the auctioneers the sum of 65*l.*

as a deposit and in part payment of the purchase money, and states that the defendant thereby agreed to pay the remainder of the purchase money and to complete the purchase according to the conditions of sale. After these events, which took place on a Friday, Mr. Ewin seems to have thought that the defendant would still come and pay his deposit. As he did not come he was communicated with, and there were two telephonic conversations between him and clerks of Mr. Ewin which were, as I think, faithfully recorded in the usual book kept at Mr. Ewin's office and are quite inconsistent with the story the defendant now tells. However, the defendant continued to be unwilling to acknowledge himself bound by the contract. On May 17, 1927, he wrote a letter denying, for the first time, that he had made the final bid; and this action was commenced on June 8, 1927. I find as a fact that the defendant was the last bidder for the property in question; and there remains only the defence that Mr. Ewin had no authority to sign the memorandum at his office on the day of the sale between the hours of 4.30 and 5 o'clock in the evening.

It has long been settled that an auctioneer is by virtue of his employment the agent of both the vendor and the purchaser to sign the contract or a memorandum sufficient to satisfy the Statute of Frauds: see *Emmerson* v. *Heelis* (1); *White* v. *Proctor* (2); *Earl of Glengal* v. *Barnard* (3); and *Sims* v. *Landray*. (4) The authority must however be exercised at the time of the sale and it cannot be exercised a few days later: *Mews* v. *Carr*. (5) The authority does not extend to the auctioneer's clerk: *Bell* v. *Balls*. (6) The authority cannot be withdrawn or revoked by the vendor or the purchaser after the fall of the hammer: *Bell* v. *Balls* (6) and *Van Praagh* v. *Everidge* (7), which is not affected on this point by the decision of the Court of Appeal in the same case (8) reversing the decision of Kekewich J. If therefore

(1) (1809) 2 Taunt. 38.
(2) (1811) 4 Taunt. 209.
(3) (1836) 1 Keen, 769, 787.
(4) [1894] 2 Ch. 318.
(5) 1 H. & N. 484.
(6) [1897] 1 Ch. 663, 671.
(7) [1902] 2 Ch. 266.
(8) [1903] 1 Ch. 434.

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Mr. Ewin at the conclusion of the sale had signed the memorandum as agent for the defendant on learning that he had left the auction-room I should have had no doubt that this was within his implied authority as auctioneer. But the question that arises is whether Mr. Ewin, who waited for an hour or two after the conclusion of the sale and signed the contract at his private office, ought to be held to have signed at a time when his authority as auctioneer had come to an end. I do not think the principle can be better stated than it was stated by Stirling J. in *Bell* v. *Balls* (1), where after referring to the cases he says this: "These cases appear to show that the authority which the purchaser confers upon the auctioneer is to write down the bidding—that is, to make a minute or record of it at the time and as part of the transaction, and such a record is held a memorandum sufficient to satisfy the statute. I do not see that the nature of the proceeding justifies the implication of an authority to make a memorandum, except at the time when the writing down can fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time evils might arise similar to those which the Statute of Frauds was intended to prevent." The learned judge then refers to the case of *Buckmaster* v. *Harrop* (2), as supporting the view that there must be a contemporary memorandum signed by the auctioneer in such a case, meaning, he says, one made "at the time and as part of the transaction of sale," and he came to the conclusion that a memorandum signed a week after the date of sale, was signed at the time when the auctioneer's authority had ceased. In the present case I have to bear in mind the fact that the defendant had not repudiated his bid in the sale-room. If the defendant had come up to Mr. Ewin at the conclusion of the sale and had promised to come to his office to pay the deposit and to sign the contract, I think it is clear that the authority of Mr. Ewin as auctioneer to sign the memorandum as agent for the defendant if he made default would have continued. If, on the other hand, the defendant had come to Mr. Ewin at the end of the sale and had definitely denied having made the

(1) [1897] 1 Ch. 663, 671. (2) (1807) 13 Ves. 456, 473.

last bid and repudiated the contract, I doubt very much whether Mr. Ewin could safely have postponed signing the memorandum on behalf of the defendant. But the defendant in the present case, though well acquainted with the practice of London auctioneers and auction-rooms, had merely raised in an informal manner a protest of no substance based upon a special condition which he should, of course, have read before making his bid. There is no evidence that the protest was even heard by Mr. Ewin. On the whole I think Mr. Ewin was justified in taking the view that such a protest would not be insisted on, and that the defendant would probably come to the office in East India Dock Road and pay his deposit and sign the contract on the day of the sale. Accordingly I have come to the conclusion that Mr. Ewin was acting reasonably in proceeding to his office immediately after the sale with the hope I have mentioned; and on receiving the information that the defendant had not come, and had not paid his deposit and was refusing to sign the contract, I hold that he was entitled to sign the memorandum as agent for the defendant. In other words, I think the writing or signature by Mr. Ewin in the present case can fairly be held to be a part of the transaction of sale.

In the result I am of opinion that there was a memorandum sufficient to satisfy s. 40 of the Law of Property Act, 1925, duly signed by an agent for the defendant. I do not think there is substance in any other objection as to the form of the memorandum, such as, for example, the recital that the deposit had been paid.

In the circumstances the plaintiff is entitled to the usual order for specific performance of the agreement and to the costs of the action.

H. L. L.

C. A. The defendant appealed. The appeal was heard on December 5, 1928.

C. A. Bennett K.C. and *W. A. Jolly* for the appellant. The appellant accepts Maugham J.'s finding of the facts and

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the appeal is on a pure question of law. There is here no memorandum of the contract to satisfy the Statute of Frauds, now the Law of Property Act, 1925, s. 40. The only authority of an auctioneer in regard to the purchaser is to note the bid and the name of the bidder in the book or particulars that are before him while conducting the sale. That becomes clear from a careful examination of the leading authorities: *Emmerson* v. *Heelis* (1) and *White* v. *Proctor*. (2) It may sometimes happen that the result is to provide a sufficient memorandum of the contract to satisfy the Statute of Frauds, but he has no authority to do more than make these entries.

[RUSSELL L.J. referred to *Sims* v. *Landray*. (3)]

This limited view as to an auctioneer's authority is supported by *Earl of Glengal* v. *Barnard*. (4)

[LAWRENCE L.J. That was not a case of an auction sale.]

No. But it makes clear the basis of the decision in *Emmerson* v. *Heelis* (1): see also *Mews* v. *Carr* (5), *Sims* v. *Landray* (3), and *Bell* v. *Balls*. (6)

Again, the auctioneer can only exercise his implied authority on behalf of the purchaser during the actual sale or at its conclusion before he leaves the rostrum. The signing of the memorandum must be part of the sale: per Stirling J. in *Bell* v. *Balls*. (6) So far as the transaction between the purchaser and the vendor is concerned, it was concluded when the auctioneer passed on to the next lot. The memorandum signed must be a contemporary memorandum: *Buckmaster* v. *Harrop*. (7) Stirling J.'s judgment in *Bell* v. *Balls* (8) is really conclusive in favour of the appellant on this part of the case. Stirling J. said the memorandum must be made at the time. It is suggested that this means while the auctioneer is still in the rostrum—certainly before he leaves the auction-room.

(1) 2 Taunt. 28.
(2) 4 Taunt. 209.
(3) [1894] 2 Ch. 318, 320.
(4) 1 Keen, 769, 788.
(5) 1 H. & N. 484.
(6) [1897] 1 Ch. 663.
(7) 13 Ves. 456, 473.
(8) [1897] 1 Ch. 663, 671.

There was in fact a repudiation of the contract by the appellant before the auctioneer signed, and whatever authority he had to sign for the appellant was taken away from him by the repudiation: *Farmer* v. *Robinson* (1); see also *Van Praagh* v. *Everidge*. (2)

Vaisey K.C. and *G. P. Slade* for the respondent were not called upon.

LORD HANWORTH M.R. This is an appeal by the defendant in the action, against whom Maugham J., by his judgment of July 3 made an order for specific performance of a contract between the plaintiff and the defendant. The facts are stated fully by Maugham J. in his judgment, but I think it well to repeat them to show how his judgment was arrived at.

[His Lordship recapitulated the facts and proceeded:]

Mr. Ewin's signature of the memorandum in the conditions of sale for and on behalf of the defendant was a sufficient memorandum within s. 40 of the Law of Property Act, 1925, re-enacting s. 4 of the Statute of Frauds, provided he had authority to sign it.

The learned judge has held that this was a valid contract and granted specific performance. From that decision the defendant appeals, and three points are made on his behalf.

His counsel say, first, that Mr. Ewin was not the purchaser's agent to sign the memorandum relied on; and, secondly, that even if he had authority to sign anything of the kind, all that he could do was to write in his own interleaved conditions of sale, that were before him at the sale, the name of the buyer and the amount of his bid. And thirdly, they say that if he had any such authority, he had authority to sign only at the time of the sale. It is not clear to what point of time counsel for the defendant admit the authority to continue. They would not, I think, say that the authority could be exercised only while the auctioneer was in the rostrum, but they certainly suggest that it could not be exercised after he left the premises at which the sale was held.

(1) (1805) 2 Camp. 339n. (2) [1902] 2 Ch. 266.

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I have, first, then to decide whether Mr. Ewin had any authority to sign a memorandum within the Statute of Frauds (now the Law of Property Act, 1925, s. 40). The law is succinctly stated by Romer J. in *Sims* v. *Landray* (1): "It is too late nowadays for the defendant to raise that point. It is settled beyond the probability of now being successfully disputed, that where there is a sale by public auction, and the property is knocked down by the auctioneer to the highest bidder, the auctioneer is not only the agent of the vendor, but he is also the agent of the purchaser, the highest bidder; and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum sufficient to satisfy the provisions of the Statute of Frauds stating the particulars of the contract." There is also the case of *Mews* v. *Carr* (2), in which the Court of Exchequer decided in the same sense as was decided in the more modern case of *Sims* v. *Landray*. (3) Pollock C.B. said: "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but for the seller only"; and Bramwell B. says: "It is now established that an auctioneer at the time of the sale, is agent for both buyer and seller." These statements of the law seem to me to be well founded on authority, and although neither is binding on the Court of Appeal, I should be sorry if this Court infringed on the authority of these cases, which have been acted on for a long period of years.

But Mr. Bennett contends that if the auctioneer is an agent for the buyer, it is only to the extent of making a note of the actual bid and the name of the bidder. The position when analysed is that the auctioneer submits the property for sale, the bidder makes his offer, and when the hammer is brought down the offer is accepted, and thereupon the transaction is completed and the auctioneer is an agent for

(1) [1894] 2 Ch. 318, 320. (2) 1 H. & N. 484, 488.
(3) [1894] 2 Ch. 318.

carrying into effect that contract. What ought the agent then to do? Mr. Bennett says that if *Emmerson* v. *Heelis* (1) is closely examined, it will appear that all the auctioneer does is to make an entry in his book, which contains a list of premises sold and purchasers. And he says that this is so not only in that case but also in *White* v. *Proctor* (2), where Mansfield C.J., following *Emmerson* v. *Heelis* (1), said: "It was there held that entering the name of the buyer in the auctioneer's book was just the same thing as if the buyer had written his own name." That does not exhaust the authorities on this point. In *Earl of Glengal* v. *Barnard* (3) Lord Langdale M.R. said: "The nature of the proceeding by auction—the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneers to write down the bidding which is perhaps involved in the very process of bidding, and some other circumstances, afford intelligible ground for the decision in *Emmerson* v. *Heelis* (1), and the approbation which has since been bestowed upon it." It appears to me that that case indicates the purpose for which authority is given to auctioneers. Pollock C.B. says in *Mews* v. *Carr* (4) in the passage I have already read: "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature"; and Bramwell B. says: "Here the auctioneer signed the defendant's name, not purporting to act for him, but as the person who sold the goods. It is now established that an auctioneer, at the time of the sale, is agent for both buyer and seller." Then what is the purpose of it? It is that he may provide evidence so as to render the contract effective; and it appears to me that according to a system well known at auctions, the memorandum attached to the particulars of sale is intended to be filled up and signed by those who purchase, and that, just as in the earlier case the auctioneer's book is treated as the important document, so now on every sale of land the contract is intended to be completed by the signature of the memorandum

(1) 2 Taunt. 38.
(2) 4 Taunt. 209, 212.
(3) 1 Keen, 769, 788.
(4) 1 H. & N. 484, 488.

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attached to the particulars of sale. With regard to the purpose or intention of the memorandum Stirling J. said in *Bell* v. *Balls* (1), after referring to the cases I have already mentioned of *Earl of Glengal* v. *Barnard* (2) and *Emmerson* v. *Heelis* (3): "These cases appear to show that the authority which the purchaser confers upon the auctioneer is to write down the bidding—that is, to make a minute or record of it at the time and as part of the transaction, and such a record is held a memorandum sufficient to satisfy the statute." The purpose of the writing signed by the auctioneer is to provide good evidence of the contract, and I cannot myself accept the view that the decisions have ever so narrowed the auctioneer's authority that it is an authority to sign his own book in the rostrum and nothing more. As time goes on, different methods are adopted of providing evidence of the contract, and at the present day I think the method is to sign the memorandum attached to the particulars of sale. In these circumstances, it is impossible to contest the view of the learned judge that Mr. Ewin had authority to sign a memorandum of the contract to satisfy the statute.

Then a third point is taken which I confess at first seemed to me to create a difficulty—namely, that the only power of the auctioneer to sign the memorandum is when the auction is proceeding, and that he must sign before he leaves the auction premises. It is pointed out that in *Van Praagh* v. *Everidge* (4) the auctioneer signed the contract for the defendant before leaving the rostrum; and it was not doubted that if the contract had fulfilled other conditions, there would have been power and authority to do that. Is it then a necessary condition that the auctioneer should sign the contract before he leaves the rostrum? It has been shown in a number of cases, of which *Mews* v. *Carr* (5) is an illustration, that the auctioneer cannot do it after the lapse of some days. It was there pointed out by Pollock C.B.

(1) [1897] 1 Ch. 663, 671.
(2) 1 Keen, 769, 788.
(3) 2 Taunt. 38.
(4) [1903] 1 Ch. 434.
(5) 1 H. & N. 484, 488.

that "the moment the sale is over, the same principle does not apply"; and Bramwell B. said: "As soon as the sale is over, the reason for the rule fails, and he is certainly not the agent of the buyer." That is clearly correct where there is a lapse of some days. What then is to be said in the present case? Was it too late when the auctioneer returned from the sale-room to his own office, and matters relating to the sale were then considered, and the signature added to the memorandum at that time? Mr. Bennett would confine the auctioneer's authority at most to the time he is in the sale-room. It appears to me to be impossible to lay down any arbitrary rule. If it cannot be said that the memorandum must be signed by the auctioneer in the rostrum, what extent of time can be allowed to him? Is it to be said that he can do it in the auction-room, but not after he gets back to his office and proceeds to finish the business of the sale in the quiet of his office? It is a pure question of degree and therefore a question of fact, and Maugham J. said in the course of his judgment: "I have come to the conclusion that Mr. Ewin was acting reasonably in proceeding to his office immediately after the sale with the hope I have mentioned." What hope was that? It was the view that Maugham J. said Mr. Ewin was justified in taking, that the defendant's protest would not be insisted on, and that the defendant would probably come to the office in East India Dock Road and pay his deposit and sign the contract on the day of the sale. There is evidence from which that inference could be drawn, for in my view, after the defendant's verbal protest, he would, if sincere, have come up to the auctioneer at the sale so that the matter could be dealt with by Mr. Ewin while he was still in the rostrum, in accordance with the National Conditions. The defendant did not do that, and Mr. Ewin may very well have thought that his protest would not be persisted in. It was therefore reasonable for Mr. Ewin to go to his office in the expectation that the defendant would come and sign the contract there, and in that case the sale may be said not to have been over. Seeing that we have the finding of Maugham J. that the auctioneer acted reasonably in going

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to his private office to complete the sale there, and that the signature by Mr. Ewin could fairly be held to be part of the transaction of sale, we ought not to disturb it. The learned judge has come to the conclusion as a matter of fact that this was so, and that it was therefore still within the auctioneer's authority to sign the contract on the defendant's behalf after he returned to his office. The case then does not fall within the principle of *Mews* v. *Carr* (1), and this was a good signature by the auctioneer on the defendant's behalf to satisfy the Statute of Frauds, or to give it its modern name, the Law of Property Act, 1925, s. 40.

The appeal must therefore be dismissed.

LAWRENCE L.J. I agree. Upwards of thirty-four years ago Romer J. in *Sims* v. *Landray* (2), in the passage quoted by the Master of the Rolls, held that it was then settled law that an auctioneer is the agent of a purchaser to sign a memorandum sufficient to satisfy the Statute of Frauds. Three years later Stirling J. in *Bell* v. *Balls* (3) said: "Upon a sale by auction the auctioneer is the agent of the purchaser as well as the seller, and has authority to sign a memorandum of the sale so as to bind both parties." In view of these cases and the authorities upon which they were based the statement of Maugham J. in the present case that "it has long been settled that an auctioneer is by virtue of his employment the agent of both the vendor and the purchaser to sign the contract or a memorandum sufficient to satisfy the Statute of Frauds" is in my judgment an accurate statement of the law, which is now settled beyond all question or doubt. Mr. Bennett has argued that the auctioneer's authority only extends to entering the name of the purchaser and the price in his copy of the particulars of the auction as and when the property is sold, and that if it is intended to rely on his signature it must be made in that copy in the rostrum directly the purchaser's bid is accepted. In my judgment that is not the law. The cases on which Mr. Bennett has founded his argument are *Emmerson* v. *Heelis* (4) and

(1) 1 H. & N. 484.
(2) [1894] 2 Ch. 318.
(3) [1897] 1 Ch. 663, 669.
(4) 2 Taunt. 38.

White v. *Proctor* (1), in which the question to be decided was whether there was a sufficient memorandum to satisfy the Statute of Frauds, the only memorandum in each case being the entry by the auctioneer of the name of the purchaser in his sale bill or book. It was decided that this entry was a sufficient memorandum to satisfy the Statute of Frauds. Those decisions involved the proposition that the auctioneer was the duly appointed agent of the purchaser to sign a memorandum of the sale so as to bind the purchaser, and for that reason no doubt these cases are cited as the foundation of the rule stated by Romer J. in *Sims* v. *Landray*. (2) Until I heard Mr. Bennett's argument, I had never known it suggested that the auctioneer's authority was limited to making an entry in his particulars of sale and did not extend to making out a proper memorandum of the sale sufficient to satisfy the Statute of Frauds, and signing such a memorandum on behalf of the vendor and the purchaser. If I rightly understand these cases, they do not attempt to limit the authority of the auctioneer to merely writing down the name of each purchaser and his bid, but are to the effect that the auctioneer has authority to record the bargain, so that it can be enforced against the purchaser. No doubt the law on this subject is somewhat peculiar, but the rule is due to the exigencies of a sale by auction and of an auctioneer's business in conducting such a sale.

The question which then arises is how long that authority persists. Mr. Bennett contended that it lasted only so long as the auctioneer was in the rostrum; Mr. Jolly contended that it only lasted until the auctioneer left the auction-room. In my judgment the Court cannot lay down any definite period of time during which the authority persists. The true principle is that the authority must be exercised so as to form part of the transaction of the auction sale. In *Mews* v. *Carr* (3) the Court on the facts came to the conclusion that the auctioneer's authority had ceased. In giving judgment Pollock C.B. said: "No doubt an auctioneer

(1) 4 Taunt. 209.
(2) [1894] 2 Ch. 318.
(3) 1 H. & N. 484, 488.

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at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only." And Bramwell B. said: "As soon as the sale is over, the reason for the rule fails, and he is certainly not the agent of the buyer." But the facts there were different from the facts in the present case, and the passage I have quoted must be read in reference to the facts which the Court had to deal with. There a lot was put up and withdrawn unsold. The auctioneer had no authority to put it up again, nor did he do so, but he purported to bind a purchaser by entering his name in the catalogue against particular lots on a purchase by private treaty made two days after the auction. In these circumstances I am not surprised that the Court held that the auctioneer's authority was no longer exercisable. That is a totally different case from the present, where the contract was entered into at the auction, and the only question is how long a period is allowed to the auctioneer to record that contract and sign a memorandum sufficient to satisfy the Statute of Frauds. That point came up for decision in *Bell* v. *Balls*. (1) There the property was sold at the auction, but the auctioneer did not enter the purchaser's name in his book until a week after the auction had taken place. Stirling J., in my opinion, rightly held that this was too late. In giving judgment that learned judge (after citing a passage from Lord Langdale's judgment in *Earl of Glengal* v. *Barnard* (2)) said: "I do not see that the nature of the proceeding justifies the implication of an authority to make a memorandum, except at a time when the writing down can fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time evils might arise similar to those which the Statute of Frauds was intended to prevent." I agree with that statement. Maugham J. has in the present case had regard to the passage I have quoted, and has in my judgment directed himself rightly on the point now under consideration. He has come to the

(1) [1897] 1 Ch. 663, 671. (2) 1 Keen, 769.

conclusion on the evidence that in the circumstances of this case the memorandum made and signed by the auctioneer can fairly be said to be a part of the transaction of sale. The relevant facts shortly stated are that Mr. Ewin left the auction-room at 3.30 in the hope that the purchaser would be persuaded to come to his private office and sign the memorandum. Mr. Ewin reached his private office at 4.30, and having been told on his arrival that the purchaser had not come to the office to sign the memorandum, as he had hoped, he immediately signed the memorandum on the purchaser's behalf. That was done at the most only one and a half hours after he had left the auction-room and, in the circumstances, without any real break in the transaction. I agree with the finding of the learned judge that the memorandum was so signed as part of the transaction of sale, and that the appeal should be dismissed.

RUSSELL L.J. I am of the same opinion. There are two points raised by the appellant, first, as to the nature and extent of the authority of auctioneers to sign on behalf of purchasers; and secondly, as to the time for which the authority persists.

I will deal with the first point on the footing that no question of the time for which the authority persists arises. As I understand the argument of Mr. Bennett, it was that when the authorities were carefully looked into, it became clear that all they decided was that the auctioneer had authority on behalf of a purchaser at the auction to make a record of his name and the amount of his bid. True it was that this record might be made in such circumstances as to produce a sufficient memorandum to satisfy the Statute of Frauds, but his only authority was to make the record. Certain of the authorities did in fact deal with cases where the only entries were of the name of the purchaser and the amount of the bid, and it happened in such cases that there was a sufficient memorandum to satisfy the statute. But in my opinion the auctioneer's authority goes further than that. It is an authority to sign a memorandum of the contract made between

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the vendor and the purchaser of the property purchased subject to the conditions of sale. Romer J. states the position quite clearly in *Sims* v. *Landray* (1) when he says: "It is settled beyond the probability of now being successfully disputed, that where there is a sale by public auction, and the property is knocked down by the auctioneer to the highest bidder, the auctioneer is not only the agent of the vendor but he is also the agent of the purchaser, the highest bidder; and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum sufficient to satisfy the provisions of the Statute of Frauds, stating the particulars of the contract. That is what the auctioneer or his clerk did in this case." And what the auctioneer did in that case was to sign a printed memorandum of agreement. In my opinion that memorandum may be made by the auctioneer either on the particulars of sale, in which case an entry of the name of the bidder and the amount of his bid might be sufficient, or in the auctioneer's book, or on a separate slip of paper containing all the necessary particulars. In Sugden on Vendor and Purchaser, 14th ed., pp. 42, 43, the matter is put in this way: "An auctioneer, however, as the agent of the purchaser, which for this purpose in law he is, may bind him to the bidding, by signing for him; if therefore he put down the purchaser's name as the buyer, and the amount of the bidding opposite to the lot in the particulars and conditions of sale, or make an entry in his books of all the requisite particulars, the purchaser will be bound. But this agency for both parties only operates at the time of the sale; after the sale is concluded, the auctioneer is no longer the agent of both parties, but of the seller only, and therefore upon a subsequent purchase of any unsold lot, the signature of the seller or his agent cannot bind the buyer. And on the other hand the auctioneer's receipt for the deposit may amount to an agreement, binding upon the seller, if it contain the names of the seller and purchaser, the description of the estate sold and the price, and refer to the conditions so as to enable

(1) [1894] 2 Ch. 318.

the Court to read them. For in either case, the memorandum, entry or receipt, by the auctioneer, must in itself, or with the particulars or other paper which it embodies by a reference, contain all the particulars required to the validity of a written agreement." In the same connection useful mention may be made of *Van Praagh* v. *Everidge* (1) not only in the Court of Appeal but also in the Court below when Kekewich J. decided the case, holding that the auctioneer had authority to sign and to bind the purchaser. The purchaser had made a bid, and Lot 1 was knocked down to him. The auctioneer sent his clerk to get the details, and the objection was then raised that the bidder had thought he was bidding for some other property. The auctioneer, who was going on with the sale of another property, declined to interrupt the sale; but before the sale of the 3rd Lot he had an interview with the discontented bidder, who refused to sign the contract. The auctioneer before leaving the rostrum signed the contract on behalf of the purchaser. Kekewich J. said (2): "There being then a contract here, can there be any doubt upon the authorities that the auctioneer was authorized to sign the necessary memorandum on behalf of the purchaser? It would be a waste of time to go into the cases. The only suggestion is that the authority having been given, and referring necessarily to the time when the highest bid was given, that could be revoked at any time afterwards." He then decided that point in a manner that was correct, if he was correct in the view that the auctioneer had signed a document which correctly represented the verbal contract previously entered into. The Court of Appeal (3) took a different view on the latter point. What had happened was that the printed form which the auctioneer signed was a form with the wrong date on it, the effect being that there were incorporated in the contract conditions impossible of performance. Therefore the memorandum signed by the auctioneer was not a memorandum of an actual contract. Romer L.J.

(1) [1902] 2 Ch. 266; [1903] 1 Ch. 434. (2) [1902] 2 Ch. 266, 269.
(3) [1903] 1 Ch. 434, 435.

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said (1): "The auctioneer had no authority to sign a document of 'October 17, 1901'; accordingly there is no contract within the Statute of Frauds. I do not myself, at present, see an answer to that." And the case was disposed of solely on that ground. The importance of that case is, that the appeal was not decided on the ground that the auctioneer had no authority to sign any memorandum, but that he had not authority to sign that particular memorandum, because it was not a memorandum of the contract between the parties. This seems to me to involve the conclusion that if there had not been a mistake as to the printed document, the purchaser would have been bound and the action would have succeeded. For these reasons I come to the conclusion on the first point that the extent and nature of the auctioneer's authority was not correctly stated by the argument of the appellant.

That only leaves to be dealt with the question whether on the facts of this case the auctioneer exercised his authority to sign on behalf of the purchaser in time, and on that point I see no reason to differ from Maugham J. His statement of the facts was accepted by the appellant, and he said: "In the present case I have to bear in mind the fact that the defendant had not repudiated his bid in the sale-room. If the defendant had come up to Mr. Ewin at the conclusion of the sale and had promised to come to his office to pay the deposit and to sign the contract, I think it is clear that the authority of Mr. Ewin as auctioneer to sign the memorandum as agent for the defendant if he made default would have continued. If, on the other hand, the defendant had come to Mr. Ewin at the end of the sale and had definitely denied having made the last bid and repudiated the contract, I doubt very much whether Mr. Ewin could safely have postponed signing the memorandum on behalf of the defendant." Then he goes on to deal with what happened, and comes to the conclusion that Mr. Ewin was justified in taking the view that the defendant's protest would not be insisted on, and therefore that he acted reasonably in not acting at once,

(1) [1903] 1 Ch. 434, 435.

but in giving the purchaser time to come and sign the contract and pay his deposit. He holds therefore that the signature by Mr. Ewin at his office could fairly be held to be a part of the transaction of sale. On the facts so found by the learned judge, I agree that his decision was correct on this point also.

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Appeal dismissed.

Solicitors for appellant: *W. A. & H. Elmore Smith, for W. A. Smith, Morton & Son, Halstead.*

Solicitors for respondent: *George Reader & Co.*

H. C. G.

In re KING'S THEATRE, SUNDERLAND.

DENMAN PICTURE HOUSES, LIMITED *v.* THOMPSON AND COLLINS ENTERPRISES, LIMITED.

ASTBURY J. 1929 *Jan.* 11, 17, 18.

[1928. D. 1743.]

Law of Property—Copyhold—Enfranchisement—Vesting of Legal Estate—Trustees—Equitable joint Tenants—Equitable Rentcharge—Law of Property Act, 1922 (12 & 13 *Geo.* 5, *c.* 16), *Sch. XII., para.* 8 (*b*) (*d*)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part II., paras.* 3, 4, 6 (*d*); *s.* 36.

On July 5, 1802, Bryan Abbs and another trustee who predeceased him were admitted to certain copyhold plots A, B and C upon trust out of the rents and profits to raise and pay an annual rent of 7*l.* 10*s.* to Harrison and his heirs and subject thereto in trust for Wilson and his heirs.

Many years after Bryan Abbs' death his customary heir H. C. Abbs, since deceased, was admitted to A and C, but no one was admitted to B; so that on December 31, 1925, the best right to admittance was in the customary heirs of H. C. Abbs and Bryan Abbs.

On the same date the equitable title to the land stood vested in Thompson and Collins as joint tenants in fee, subject to the equitable rentcharge then vested in Aylmer (subject to proof of his title).

On January 1, 1926, the Law of Property Acts came into operation and the copyhold plots were enfranchised.

The Court being asked to determine in whom the legal estates in the land and the rentcharge vested, *held* as follows:—

(*a*) Under the 1922 Act, Sch. XII., para. 8 (*b*), the freehold estate in the land vested in the first instance in the personal representative of

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H. C. Abbs and the customary heir of Bryan Abbs as trustees, Bryan Abbs having no known personal representative.

(*b*) Either under the 1922 Act, Sch. XII., para. 8 (*d*), or under the 1925 Act, Sch. I., Part II., paras. 4, 6 (*d*), the rentcharge vested as a legal rentcharge in Aylmer or other the persons entitled thereto.

(*c*) On the rentcharge becoming a legal rentcharge the trustees became bare trustees with no longer any active duties to perform.

(*d*) Under the 1925 Act, Sch. I., Part II., paras. 3, 6 (*d*), the initial vesting in the trustees was divested and the legal estate subject to the legal rentcharge vested in Thompson and Collins as joint tenants in fee simple.

(*e*) Sect. 36 of the 1925 Act did not come into operation until after the vesting provisions had done their work. It then merely attached a trust for sale to the joint legal estate in Thompson and Collins. It did not previously attach a trust for sale to the initial estate in the trustees so as to put the divesting provisions of Sch. I., Part II., out of operation. Still less did it bring in the undivided share provisions of Sch. I., Part IV.

ORIGINATING SUMMONS.

This was a summons in the nature of a vendor and purchaser summons issued by the purchasers under the Law of Property Act, 1922, Sch. XII., para. 8, proviso 1, and the Law of Property Act, 1925, s. 3, sub-s. 4, and s. 49, to determine certain points on the vendors' title to three adjoining plots of land A, B and C formerly copyhold of the manor of the Rectory of Bishopswearmouth.

By a surrender and admittance of July 5, 1802, Bryan Abbs and William Bell were admitted to A, B and C (then one entire piece of land) upon trust that they should by and out of the rents and profits of the land or by mortgage or sale thereof or by distress on the chattels thereon raise and levy and pay to Harrison (a surrenderor) his heirs and assigns for ever the annual rent or yearly sum of 7*l.* 10*s.* And subject thereto the land should be held upon such trusts as Wilson (who had agreed to purchase it) should by will appoint and in default of appointment In trust for Wilson his heirs and assigns.

Bryan Abbs survived William Bell and died leaving two sons, one of whom died without issue and intestate, and the other died in 1872 intestate, leaving H. C. Abbs, his eldest son, the customary heir of Bryan Abbs.

On March 13, 1902, H. C. Abbs was admitted to A. The trusts were not referred to.

On July 15, 1904, H. C. Abbs was admitted to C subject to the 1802 trusts.

There had been no admittance to B since 1802.

On December 14, 1923, H. C. Abbs died, having by his will of February 28, 1912, appointed his wife Dagmar his executrix. She proved the will on February 11, 1924.

Wilson's equitable title to the whole property, subject to the 7*l.* 10*s.* rent, was properly traced to George Black and Alfred Black as tenants in common, and by a conveyance on sale dated November 1, 1919, the equitable estate was conveyed by them to Thompson and Collins as joint tenants subject to the 7*l.* 10*s.* rent.

On January 1, 1926, the Law of Property Acts came into operation and the copyhold was enfranchised.

By a conveyance on sale dated March 24, 1927, Thompson and Collins conveyed A, B and C to the vendors in fee simple subject to the rentcharge and to such manorial incidents as affected the property before enfranchisement and were saved by the Law of Property Act, 1922.

On March 14, 1928, the vendors agreed to sell A, B and C and many other properties to a company, subject to the rentcharge and existing manorial incidents. The present purchasers were the company's nominees and entitled to the benefit of this agreement.

On examining the title the purchasers took the view that the vendors could not convey the legal estate. The vendors, on the other hand, contended that by virtue of the Property Acts, 1922 and 1924, and the Law of Property Act, 1925, the legal estate, subject to a legal rentcharge of 7*l.* 10*s.*, became vested in Thompson and Collins jointly, and subsequently in the vendors, and they could make a valid legal conveyance.

On July 25, 1928, the purchase was completed by arrangement, the vendors having undertaken to join in any application to the Court to determine the points in dispute. If they could not convey subject to the rentcharge they would redeem it at the purchasers' expense. If the Court decided

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that the vendors could without more make a valid and effectual conveyance of the legal estate the purchasers were to pay the costs. In the event of a contrary decision the vendors were to pay them.

The equitable title to the 7*l.* 10*s.* rent was believed to have vested in the defendant Aylmer as life tenant in possession under the will of his father, who died on August 20, 1868.

By a vesting deed of December 4, 1926, executed by the will trustees and the defendant Aylmer, it was declared that the rentcharge was vested in the defendant Aylmer in fee simple upon the trusts of the will, and that the trustees should be Settled Land Act trustees.

The purchasers had arranged to purchase this rentcharge, but the title had still to be investigated, in order to see whether the will really passed the rentcharge, as had hitherto been assumed. The case was in fact argued on the footing that the defendant Aylmer was equitable life tenant, and it was only at the close that the question on his title was mentioned. Saving words were put in the declaration to meet the possible point.

On October 5, 1928, the purchasers issued this summons to determine

1. Whether upon the coming into force of the Property Acts, 1922 and 1924, and the Law of Property Act, 1925, and subject to the manorial incidents affecting the said land

(*a*) The defendant Aylmer became entitled to a legal rentcharge of 7*l.* 10*s.* charged upon the said land and subject thereto the same vested as freehold in Thompson and Collins as joint tenants for a legal estate in fee simple.

(*b*) The said land vested as freehold for a legal estate in fee simple as to A and C in the defendant Dagmar as personal representative of H. C. Abbs and as to B in the personal representatives of Bryan Abbs, and if so whether upon the statutory trusts for sale, and as to the proceeds of sale upon trust to pay an annual rent of 7*l.* 10*s.* to the defendant Aylmer and subject thereto for Thompson and Collins as joint tenants or upon some other and what trusts.

(*c*) The land vested as freehold in some other and what persons upon what estates and upon what trusts.

2. Whether the vendors had made a good title according to the contract and effectually assured the land in performance thereof.

3. If necessary that new trustees be appointed and the land vested in them in fee simple.

4. In the alternative that the land be vested in the purchasers in fee simple.

The vesting order was asked for under the Trustee Act, 1925 (15 Geo. 5, c. 19), s. 44.

The relevant provisions of the Acts are fully stated in the judgment, the 1924 amendments being incorporated.

Harold Christie for the purchasers. On January 1, 1926, the copyhold was enfranchised under the 1922 Act, s. 128, the enfranchisement being deemed to be effected immediately before the 1925 Act commenced: see the 1925 Act, s. 202. References in the 1922 Act to any enactment repealed by the 1925 Act are to be construed as references to the corresponding enactment in the 1925 Act: see the 1925 Act, s. 207 (*c*).

There was no tenant on the rolls at this date, and apart from the new legislation the right to admittance to A and C, and to B would have been in the customary heirs of H. C. Abbs and Bryan Abbs respectively, as, after 1887, the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, did not apply to copyholds: see the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

But under the 1922 Act, Sch. XII., para. 8 (*b*), the freehold estate vested as to A and C in the defendant Dagmar as trustee and as to B in the unknown customary heir of Bryan Abbs (hereinafter called X). It vested in them as trustees for the equitable owners Thompson and Collins as joint tenants subject to the equitable rent or annuity, to which we submit that para. 8 (*d*) does not apply.

These trustees therefore under s. 36 of the 1925 Act held the legal estate on trust for sale in like manner as if the

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equitable owners were tenants in common. That not only prevented Sch. I., Part II., paras. 3, 4, applying, but brought in the undivided share provisions of Sch. I., Part IV., and also provisoes (IV.) and (V.) of the 1922 Act, Sch. XII., para. 8.

[ASTBURY J. Joint tenants who have not severed do not hold in undivided shares.]

I agree. But s. 36 practically puts them in the same position and impliedly introduces the undivided share provisions.

The trustees therefore held the legal estate on the statutory trusts of s. 35—namely, on trust to sell and hold the net proceeds upon the trusts requisite for giving effect to the rights of the persons interested in the land, including an incumbrancer whose incumbrance is not secured by a legal mortgage.

Under the definition section, s. 205, sub-s. 1, incumbrance (cl. vii.) includes a trust for securing money; legal estates (cl. x.) mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorized to subsist or to be created as legal estates; and rent (cl. xxiii.) includes an annual or periodical payment charged upon land.

The result is that the defendant Aylmer has at most a claim on the income of the proceeds of sale.

J. M. Baily for the vendors. Under the 1922 Act, Sch. XII., para. 8 (*b*), the legal estate was first vested in the defendant Dagmar and X on the 1802 trusts—namely, to secure the rentcharge and subject thereto for the terre-tenants.

Para. 8 (*d*) then came into operation and vested a legal rentcharge in the defendant Aylmer and the legal estate in the land subject thereto in the equitable owners Thompson and Collins as joint tenants.

If, however, para. 8 (*d*) did not operate in this way, the vesting was clearly effected by the 1925 Act, Sch. I., Part II., paras. 3, 4, 6 (*d*). Sect. 36 then no doubt brought in the provisions of ss. 34, 35, but it did not bring in the undivided share provisions of Sch. I., Part IV.; and it certainly did not interfere with the previous vesting provisions.

McAndrew for the defendant Aylmer adopted this argument.

F. D. Morton for the defendant Dagmar. The purchasers seek to apply s. 36 before ascertaining in whom the legal estate is vested. That is putting the cart before the horse, as surely the vesting provisions must operate before there is anything for s. 36 to act on.

The vendors and the defendant Aylmer need not rely on the somewhat involved Sch. XII., para. 8 (*d*), of the 1922 Act, as they clearly got the legal estate from the trustees under the 1925 Act, Sch. I., Part II., paras. 3, 4, 6 (*d*).

The fact that the legal estate in the rentcharge vested is borne out by para. 7 (*d*), which enacts that nothing in this part of the Schedule shall operate to vest in a person entitled to a rentcharge any legal estate "except a legal estate in the rentcharge." The negative pregnant is manifest.

Sect. 36 then applied, because the legal estate in the land after this vesting was "beneficially limited to" Thompson and Collins as joint tenants. A trust for sale was then attached to their joint ownership, but the undivided share provisions of Sch. I., Part IV., were not dragged in.

Donald Cohen and *W. F. Waite* for the Lords of the Manor asked that any order should be made expressly subject to their rights under the 1922 Act, Sch. XII., para. 5.

Harold Christie in reply. The vendors do not really rely on the 1922 Act, Sch. XII., para. 8 (*d*), whatever that provision may mean. They rely on para. 8 (*b*) as effecting a preliminary vesting in the trustees, and then seek to divest the trustees' estate in favour of the equitable owners under the 1925 Act, Sch. I., Part II., para. 3.

But, even assuming that para. 3 was not ousted by the trust for sale imposed by s. 36, these trustees were not bare trustees. They had an active duty to perform—namely, to raise and pay the 7*l.* 10*s.* annually.

Again the defendant Aylmer was more like an annuitant. He had a personal remedy against the trustees, but no right in rem, or equitable rentcharge. He is therefore not within para. 4.

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The legal estate therefore remained vested in the defendant Dagmar and X on trust, subject to paying the annuity, for Thompson and Collins as equitable joint tenants, and, if the trustees sell under the statutory trusts imposed by s. 36, they will have to pay the annuity out of the income of the proceeds of sale.

ASTBURY J. [after stating the facts and pointing out that apart from the new legislation the property would have remained copyhold, the customary heir of H. C. Abbs being entitled to admittance to A and C, and X, the customary heir of Bryan Abbs, to B, and the equitable title being clear, continued :] Apart from the simplifying statutes of 1922, 1924 and 1925 the matter would be perfectly plain, but owing to the recent legislation it is now necessary to ascertain whether a proper title has been made to the land subject to the rentcharge, or whether some other and further title is required in order to give the purchasers the legal estate.

The application is made under the 1922 Act, Sch. XII., para. 8, proviso i.

Before dealing with the sections governing the precise question it is convenient to refer to certain general provisions of the Acts.

Sect. 207 (*c*) of the 1925 Act provides that " References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act " so that in respect of the repealed provisions of the 1922 Act the corresponding enactments in the 1925 Act are to be regarded. Sect. 202 provides that " For giving effect to this Act, the enfranchisement of copyhold land, ... effected by the Law of Property Act, 1922, as amended by any subsequent enactment, shall be deemed to have been effected immediately before the commencement of this Act."

That refers to s. 128, sub-s. 1, of the 1922 Act, which provides that " As from the commencement of this Act, every parcel of copyhold land shall by virtue of this Act be enfranchised and cease to be of copyhold or customary tenure,

and land so enfranchised is in this Act referred to as enfranchised land." Sub-s. 2 contains a proviso that nothing in this part of the Act shall affect certain manorial incidents therein referred to. So that now the copyhold land has become freehold subject to certain manorial incidents, including the mineral rights. This land therefore was freehold when the vendors bought it from Thompson and Collins.

I must now ascertain how these statutes affected the title in order to decide whether the purchasers have already received a good title subject to the rentcharge, and, if not, in whom the title necessary to complete their title is now vested.

The 1922 Act, Sch. XII., para. 2, provides that: "The enfranchisement shall not, except as in this Act mentioned, affect the rights or interests of any person in the enfranchised land under a will, settlement, mortgage, or otherwise by purchase, but those rights and interests shall (subject to the provisions of Part I. of this Act) continue to attach upon the land enfranchised in the same way as nearly as may be as if the freehold had been comprised in the instrument or disposition under which that person claims, and accordingly the enfranchised land shall (save as expressly provided by this Act) be subject to the same or corresponding trusts, powers, executory limitations over, rights and equities (if any) and to the same or corresponding incumbrances and obligations as affected the land immediately before the commencement of this Act."

Para. 5 provides that "An enfranchisement by virtue of this Act of any land (including any mines and minerals hereinafter mentioned) shall not affect any right of the lord or tenant in or to any mines, minerals, ... whether in or under the enfranchised land or not," and so on.

I now turn to the provisions more particularly relied on by the vendors and purchasers.

The 1922 Act, Sch. XII., para. 8 (*b*), provides: "If there is no copyholder in fee "—the present case—" the freehold estate in fee simple shall (subject as provided in this Schedule) vest in the person who immediately before the commencement

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of this Act had the best right to be admitted as copyholder in fee, otherwise than as mortgagee, but such person shall (save as hereinafter provided) be personally liable to pay the fines and fees which would have been payable by him on admittance."

Therefore where, at the date the Act came into operation, there was no copyholder in fee (the present case), the land is to vest in the person who immediately before the commencement of the Act had the best right to be admitted.

If the paragraph had ended there that person, as to A and C, would have been the customary heir of H. C. Abbs, the last tenant on the roll, and as to B, X, the customary heir of Bryan Abbs.

But the paragraph proceeds "and if the last person who was admitted as copyholder in fee (being a trustee) has died before the commencement of this Act (whether or not having disposed of the land by will), his personal representative, if any, shall be deemed to have had a better right to be admitted than the devisee or customary heir."

That means that if the person last admitted was a trustee (the present case) his personal representative shall be deemed to have a better right to admittance than his devisee or customary heir. The result is that as to A and C the defendant Dagmar, as the personal representative of H. C. Abbs, had a better right to be admitted than his customary heir; but as to B, there being no personal representative of Bryan Abbs, X his customary heir would have the best right to admittance. The effect of para. 8 (*b*) is that on the enfranchisement A and C vested in the defendant Dagmar as trustee and B vested in X as trustee.

If the matter stopped there it would be simple enough, but this vesting in these trustees under para. 8 (*b*) appears to me to be merely a transitory vesting for the purpose of bringing other sections of the Acts into operation.

Para. 8 (*d*) provides that "Where at the commencement of this Act the copyhold land was subject to interests affecting or derived out of the fee simple which are under this Act capable of subsisting at law, but immediately after such

commencement were not capable of being overreached by virtue of a subsisting trust for sale or a settlement, the persons entitled shall (subject to the terms of years absolute of prior mortgagees) take legal estates in the enfranchised land corresponding to their former equitable or other interests, but subject to the manorial incidents (if any) affecting such interests until the same are extinguished under Part VI. of this Act."

The vendors contend that under para. 8 (*d*) they took a legal estate in the enfranchised land subject to the rent, and that the rent-owner took a legal estate in his rentcharge. There is a good deal to be said for this view. I think the rent was an interest "affecting or derived out of the fee simple" which the land became under the Act, that it was "capable of subsisting at law" under the 1925 Act, s. 1, sub-s. 2 (*b*), and that it was not capable of being overreached by virtue of a subsisting trust for sale or a settlement.

If so the rentcharge became vested in the defendant Aylmer as legal life tenant, but I feel a difficulty in holding that para. 8 (*d*) transferred the legal estate in the land subject to the rent to Thompson and Collins. Having regard to subsequent sections I think that para. 8 (*b*) does not finally vest the land in the person having the best right to call for admittance unless that right brings him either by beneficial ownership or otherwise within the class of persons who are to take the fee simple under the 1925 Act, Sch. I., Part II.

The 1925 Act, Sch. I., Part II., para. 3, provides that "Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided."

Now immediately after the commencement of this Act the property was vested in the defendant Dagmar and X as trustees under the 1922 Act, Sch. XII., para. 8 (*b*), but they were not trustees for sale, and it seems to me that under the 1925 Act,

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Sch. I., Part II., para. 3, Thompson and Collins, the beneficial owners as joint tenants of the land subject to the rentcharge, were the persons entitled within para. 3 to require the legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in them. If so the statute affected the vesting.

The purchasers, who merely want a good title, suggest that that is erroneous, contending that Thompson and Collins were not entitled to require their trustees' estate to be vested in them.

Now from 1802 this property has been dealt with consistently from time to time by the beneficial owners of the rent and of the land subject thereto. The trustees originally admitted in 1802 were mere trustees without any active duties to perform, if the persons for whom they held were entitled to obtain absolute legal interests. If these Acts had not been passed, these trustees would, I think, still have held the land in trust, but the effect of the statutes is that the rent owner became entitled to be clothed with the legal estate in his rent and the land owners subject to the rent became entitled to be clothed with the legal estate in the land. They would then be entitled to call for any estate outstanding in their trustees, who had no longer any trusts to perform.

There are, of course, difficulties in arriving at this conclusion, just as there are difficulties in arriving at any conclusion under many other sections of these simplifying Acts; but on the whole I have come to the conclusion, which I think carries out the legal and beneficial interests of the parties in the most direct and best manner, that under Sch. I., Part II., para. 3, Thompson and Collins became entitled to require the legal estate outstanding in their trustees before the Acts operated to be conveyed to or vested in them as soon as they obtained their rights on the statute coming into operation. If so, the statute itself vested the legal estate in Thompson and Collins as joint tenants, and displaced the legal estate in their trustees obtained, but only transitorily obtained, under the 1922 Act, Sch. XII., para. 8 (*b*).

As to the rentcharge the 1925 Act, Sch. I., Part II., para. 4, provides that "Any person who, immediately after the commencement of this Act, is entitled to an equitable interest capable of subsisting as a legal estate which has priority over any legal estate in the same land, shall be deemed to be entitled for the foregoing purposes to require a legal estate to be vested in him for an interest of a like nature not exceeding in extent or duration the equitable interest:

Provided that this paragraph shall not—

(*a*) apply where the equitable interest is capable of being overreached by virtue of a subsisting trust for sale or a settlement;

(*b*) operate to prevent such person from acquiring any other legal estate under this Part of this Schedule to which he may be entitled."

Under that paragraph coupled with para. 3 the owner of the perpetual rent which took priority over the landowner's interest was entitled to an interest capable of subsisting as a legal estate with priority over any legal estate in the land. He therefore became entitled to require the legal estate in the rentcharge to be vested in him and the Act vested it accordingly.

I am not clear whether the legal estate in the rentcharge vested under the 1922 Act, Sch. XII., para. 8 (*d*), or under the 1925 Act, Sch. I., Part II., paras. 3, 4. It is quite immaterial, as on either hypothesis the legal rentcharge has vested in him. If so the title given to the purchasers is a good title to the land subject to the rent, which I understand they have arranged to purchase.

I will now deal with the purchasers' contentions. The 1925 Act, s. 36, sub-s. 1, provides that "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity."

That is a very difficult section to construe. It is not part of the transitional provisions. It is a section standing by itself, and of general application. In the present case it

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might possibly apply to this property at three different points of time—namely :—

1. At the time immediately before the commencement of the Acts.

2. At the time immediately after Sch. XII., para. 8 (*b*), of the 1922 Act had vested the property in the trustees.

3. At the time immediately after the 1925 Act, Sch. I., Part II., had taken the property out of those trustees and vested it beneficially in the beneficial owners.

I do not think that s. 36 applies to the first point of time. Nor do I think it can apply so as to prevent the 1925 Act, Sch. I., Part II., doing its work—namely, effecting the final vesting of the property in the beneficial owners as distinct from the transitory vesting in the trustee owners under the 1922 Act, Sch. XII., para. 8 (*b*). If so the joint effect of the 1922 Act, Sch. XII., para. 8, and the 1925 Act, Sch. I., Part II., paras. 3, 4, 6 (*d*), was to give a legal estate in the rentcharge to the defendant Aylmer and the legal estate in the land subject thereto to Thompson and Collins.

If that is so, it is only reasonable to read s. 36 as applying to property in respect of which vesting provisions of the Acts have done their work so that the legal estate, not being settled land, was beneficially limited to Thompson and Collins as joint tenants, and as such was held by them " on trust for sale in like manner " as if they were tenants in common.

As they were absolute owners of the freehold, the rentcharge owner having his independent legal estate in his rentcharge, the provision that they are to hold the land on trust for sale can only mean that they have a trust for sale over property to which they are absolutely entitled and in which no other persons have any estate interest or right, the legal estate in the rentcharge being something paramount to and independent of the legal estate in the land. If that is so Thompson and Collins were further enabled to make a title to the present vendors.

The purchasers, however, contend that the legal estate in the land was held in trust for Thompson and Collins as joint tenants.

That could only be so if the 1922 Act, Sch. XII., para. 8 (*b*), vested the property finally in the defendant Dagmar and X, instead of subject to the divesting provisions of the 1925 Act, Sch. I., Part II. Now I have already held that vesting under the 1922 Act, Sch. XII., para. 8 (*b*), in this case was merely transitory and was divested in favour of the beneficial and rightful owners under the 1925 Act, Sch. I., Part II. This land therefore was never after the Acts came into operation held in trust for Thompson and Collins as joint tenants within s. 36. On the contrary the legal estate was vested in them under Sch. I., Part II.

The purchasers then contend that, having regard to its language, s. 36 brings Sch. I., Part IV., of the 1925 Act into operation. I do not agree. Part IV., para. 1, says: "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect." In my judgment, this land was never held "at law or in equity in undivided shares vested in possession" and therefore Part IV. does not apply.

I ought to add one further remark as to B. The person in whom A and C were vested is known. The customary heir of Bryan in whom B was vested is not known. That, however, is quite immaterial, because, like the defendant Dagmar, he only comes in under the 1922 Act, Sch. XII., para. 8 (*b*), as a conduit pipe to enable the interest to be divested from him and vested in the beneficial owner the moment after the initial vesting takes place.

I will therefore declare that upon the coming into force of the Property Acts, 1922 and 1924, and the Law of Property Act, 1925, the defendant Aylmer or such other persons as at that date were entitled to the 7*l.* 10*s.* rent became entitled in fee simple to a legal rentcharge of 7*l.* 10*s.* charged upon A, B and C, and that subject thereto and to the manorial incidents affecting the land, and the rights of the Lords of the Manor preserved by the Law of Property Act, 1922, Sch. XII., para. 5, the land vested as freehold in Thompson and Collins as joint tenants for a legal estate in fee simple.

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I will also declare that a good title has been made to the land according to the contract of March 14, 1923, and that the conveyance of July 25, 1928, constituted an effective assurance in performance thereof.

The plaintiffs must pay the defendants' costs, to be taxed, in the case of the defendant Dagmar as between solicitor and client and in the case of the other defendants as between party and party.

Solicitors: *Lawrance, Messer & Co.; Sharpe, Pritchard & Co., for Charles Shortt & Co., Newcastle-upon-Tyne; Crossman, Block & Co., for McKenzie & Co., Sunderland; Sayer, Ledgard & Smith, for Wilsons, Ornsby & Cadle, Durham; Milles, Jennings White & Foster.*

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LLOYDS BANK, LIMITED *v.* THE COMPANY.

[1928. L. 281.]

Company—Debentures—Floating Charge—Fixed Charge—Receiver—Preferential Creditors—Priority—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.

The Companies (Consolidation) Act, 1908, s. 107, sub-s. 1, provides "Where, in the case of a company registered in England or Ireland, ... a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge . . . ., then, if the company is not at the time in the course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver . . . . in priority to any claim for principal or interest in respect of the debentures":—

Held, that when the receiver is appointed by a debenture holder whose debenture is secured by both a fixed charge and a floating charge,

the priority given to the preferential debts applies only in respect of assets subject to the floating charge and not to assets subject to the fixed charge.

Decision of Tomlin J. affirmed.

ADJOURNED SUMMONS.

The plaintiffs, Lloyds Bank, Ld., were the holders of a first debenture issued by the defendant company, Lewis Merthyr Consolidated Collieries, Ld., by virtue of a deed dated January 18, 1924. By clause 1 the defendant company (inter alia) agreed to pay the plaintiffs on demand all moneys and liabilities which were then or at any time thereafter due or owing by the company to the plaintiffs, or for which the company might be or become liable to the plaintiffs on any account or in any manner whatever. By clause 3 the company as beneficial owner thereby charged with the payment of all moneys and liabilities thereby agreed to be paid or intended to be thereby secured . . . .; and so that the charge thereby created should be a continuing security: firstly, the freehold leasehold and copyhold property of the company, both present and future, and the fixed plant machinery and fixtures (including trade fixtures) from time to time thereon, secondly, the goodwill and the uncalled capital of the company both present and future, and thirdly, the undertaking and assets of the company both present and future. And it was thereby further declared that the charge thereby created should as regards the premises firstly and secondly described be a fixed first charge, and as to the premises thirdly described should be a floating charge, but so that the company should not without the consent in writing of the plaintiffs (the Bank) create any mortgage or charge upon and so that no lien should in any case or in any manner arise on or affect any part of the said premises thirdly described ranking either in priority to or pari passu with the charge thereby created. And it was further provided by clause 6 that the plaintiffs might by writing as therein mentioned appoint a receiver or receivers of the premises thereby charged or any part thereof.

A second debenture for 50,000*l.* was issued to the plaintiffs by the defendant company on November 25, 1926, and by

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such debenture the defendant company thereby charged with the payment of such sum its undertaking and all its property and assets, both present and future, including its uncalled capital for the time being. And it was laid down as one of the conditions subject to which such debenture was issued, that it was one of a series of second debentures, issued or proposed to be issued for securing an aggregate principal sum not exceeding 250,000*l.*, and that the debentures of such series were all to rank pari passu without any preference or priority one over another as a second charge on the property thereby charged, and next after the first debenture dated January 18, 1924, in favour of the plaintiffs, as a continuing security for the payment to the plaintiffs of all moneys and liabilities from time to time owing or incurred by the company to the plaintiffs, whether before or after the issue of the debentures of the second series or any of them, ..., and the charge created by such second debenture was to be a floating security, save that the defendant company was not to be at liberty to create any mortgage or charge on its undertaking property or assets or any part thereof ranking pari passu with or in priority to the debentures of the second series. . . . . In the same debenture was also contained a power to appoint a receiver of the defendant company's undertaking property and assets thereby charged.

On February 8, 1928, the plaintiffs, as holders of the first debenture dated January 18, 1924, and the second debenture above mentioned, commenced an action against the defendant company claiming a declaration that the said first debenture and the said second debenture constituted charges upon all the property and assets of the defendant company comprised therein.

By an order on motion dated February 14, 1928, Leonard D. Williams and Bernard E. Brown were appointed receivers on behalf of the plaintiffs and all other holders of the first debenture and second debentures issued by the defendant company of all the property and assets of the defendant company (except uncalled capital) comprised in or subject

to the charge created by the said debentures, and to manage the business of the defendant company.

By an order dated April 12, 1928, made on a summons in the action, it was (inter alia) ordered that the Rhondda Urban District Council (who were claimants in respect of rates) be at liberty to attend the proceedings in the action; and it was further ordered that two conditional contracts for the sale of the defendant company's freehold and leasehold properties and assets be carried into effect. By a further order dated April 27, 1928, made on summons, it was ordered that one Frederick Densley, a member of the South Wales Miners' Federation, who claimed to be entitled to compensation for injuries sustained while an employee of the defendant company, be appointed to represent the class of workmen claiming to be entitled to compensation from the defendant company under the Workmen's Compensation Acts, 1906 to 1923, or the Act of 1925; and to priority and preferential payment of arrears for such compensation (if any), by virtue of the Companies (Consolidation) Act, 1908, ss. 107 and 209.

A further summons in the action was now taken out by the plaintiffs for a declaration that the preferential payments required by the Companies (Consolidation) Act, 1908, s. 107, to be paid in priority to all other debts of the defendant company, were payable only out of such assets of the defendant company as were comprised in or subject to the floating charge created by the first debenture of the defendant company dated January 18, 1924, and held by the plaintiff bank, and were not payable in priority to the moneys secured by the said debenture out of such assets of the defendant company as were comprised in or subject to the first fixed charge created by the said debenture.

It was claimed on behalf of the plaintiffs that they were secured creditors for over 439,000*l.*, which included both the amount secured by the first debenture and the second debenture. The preferential creditors were estimated at about 175,000*l.*, of which about 125,000*l.* was in respect of the claims for compensation put forward by workmen, employees of the defendant company.

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The summons came on for hearing before Tomlin J. on July 16, 1928.

W. Greene K.C. and *H. C. Bischoff* for the plaintiff bank. This is a summons involving the construction of the Companies (Consolidation) Act, 1908, ss. 107 and 209. (1)

[TOMLIN J. It really only involves s. 107, as s. 209 applies only in cases of winding up.]

Both the sections were considered in *In re Glyncorrwg Colliery Co.* (2) In *Richards* v. *Kidderminster Overseers* (3) North J. dealt with the question of a preferential charge and the question of priority. This present case is clearly one to which s. 107 is applicable. The history of these preferential payments in bankruptcy and priority of debts is a very long one. The earliest statute seems to have been (*a*) an Act in 1825 (6 Geo. 4, c. 16). This was followed by (*b*) the Act of 1849 (12 & 13 Vict. c. 106), s. 166 et seq.; (*c*) the Act of 1861 (24 & 25 Vict. c. 134), s. 156; (*d*) the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 32; (*e*) the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40; (*f*) the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which extends payments to companies in winding up (s. 1, sub-s. 1); (*g*) the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19). Sect. 107 would always take effect, unless there is a winding up made before the appointment of a receiver. The priority laid down by the section can only be in respect of assets subject to the floating charge: see the case of *National Provincial Bank of England* v. *United Electric Theatres, Ld.* (4)

(1) Companies (Consolidation) Act, 1908, s. 107: (1.) "Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

(2) [1926] Ch. 951.

(3) [1896] 2 Ch. 212.

(4) [1916] 1 Ch. 132.

A. Grant K.C. and *L. W. Byrne* for F. Densley, a representative employee of the company claiming compensation for injuries. We rely on the language of the Companies (Consolidation) Act, 1908, and the Workmen's Compensation Act, 1925. But one must first look at the Bankruptcy Act of 1914, s. 33. "Property" and "secured creditor" are both defined in s. 167 in wide terms. Sect. 33 (*d*) is the relevant sub-section in support of our contention. What the legislature intended was that on a receiving order being made the first thing to do was that these debts should be discharged before others. The question first appeared in company law in winding-up cases, and the same effect was produced in company law as in the law of bankruptcy: see s. 186 of the Companies (Consolidation) Act, 1908. It should not now read "pari passu." After that comes questions of priority. If one reads the words literally, i.e., s. 107, and the Workmen's Compensation Act, 1925, s. 7, sub-s. 3, these claims for which we are contending come before all debenture holders; they are postponed to our rights. This section of the Workmen's Compensation Act is really an interpretation by the legislature of s. 107 of the Companies (Consolidation) Act, 1908.

There is a great difference for my purpose between a fixed and a floating charge. The two sections, 107 and 209, cannot be read together.

A. T. James K.C. and *V. J. Lewis* for the Rhondda Urban District Council adopted A. Grant K.C.'s argument.

W. Greene K.C. in reply.

TOMLIN J. This is an application in a debenture holders' action by the plaintiffs, who are the holders of first debentures of the defendant company, for a declaration that the preferential payments required by the Companies (Consolidation) Act, 1908, s. 107, to be paid in priority to all other debts of the defendant company, are payable only out of such assets of the defendant company as are comprised in or subject to the floating charge created by the first debenture of the defendant company dated January 18, 1924, and held

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by the plaintiff bank, and are not payable in priority to the moneys secured by the said debenture out of such assets of the defendant company as are comprised in or subject to the fixed first charge created by the debenture.

Now the history of the legislation leading up to the sections of the Companies (Consolidation) Act, 1908, which are relevant to the question raised by this summons, has been indicated by counsel in the argument, and it is not, I think, necessary for me to go through it again beyond saying this, that provision for payment of certain classes of debts preferentially, was first made in the case of bankruptcy. In 1888 the principle was extended to the winding up of companies, and it was in 1897 that for the first time the same principle was introduced into the case where a receiver is appointed or possession is taken of assets comprised in certain classes of debentures, at a time when there is no winding up pending. It is admitted that the principle only applies where you get a debenture of which it can be predicated that it contains a floating charge; it is only in that class of case that the sections in question apply.

But the problem which I have to decide is whether, assuming, and I do not think it is disputed, that the principles do apply to any debenture which contains a floating charge—even though it also contains a fixed charge—the priority given to this particular category of debts is a priority in respect of the assets subject to the floating charge only, or whether, where the debenture also contains a fixed charge, the creditors are entitled to claim priority in respect of assets subject to either a fixed charge or a floating charge; in other words, whether, the moment you find, as it were, a debenture tainted by a floating charge, the debenture holders' capital and interest is postponed in respect of the assets subject both to the floating charge and to the fixed charge to the creditors whose claims fall within the preferential category.

Now the answer to the problem is to be found in the construction of s. 107. The sections in the Companies (Consolidation) Act, 1908, which correspond with the sections in the Preferential Payments in Bankruptcy Amendment Act,

1897, are s. 107 in the Act of 1908 corresponding with s. 3 in the Act of 1897, and s. 209 in the Act of 1908 corresponding with s. 2 in the Act of 1897. The question depends on s. 107, because that is a section which relates to the case of a receiver or possession being taken under a debenture containing a floating charge where there is no winding up, and it is strictly upon the construction of that section, and that section alone, that the answer is to be found. But I have been referred also to s. 209 of the Act of 1908, which applies the principle in the case of winding up, and I have also been referred to the Workmen's Compensation Act, 1925, s. 7, which, in Mr. Grant's submission, is relevant, because, as he says, it is an interpretation by the legislature of s. 107.

I propose, first of all, to examine s. 107, without regard either to s. 209 of the Act of 1908 or the Workmen's Compensation Act, 1925, and see what in my view the language of that section ought to mean, regarded, if I may use the phrase, in vacuo, without regard to the other Acts which have been referred to. Now s. 107, sub-s. 1, is in these terms: "Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge"—that is the first alternative; a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge—"or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge"; that is the second alternative.

Now pausing there, the only comment I will make on that is this, that so far only one charge has been referred to—namely, a floating charge—and it seems to me inevitable to come to the conclusion that the antecedent of "the charge" is the "floating charge," referred to immediately previously. In either of those two alternatives this result is to follow, "then, if the company is not at the time"—that means at the time of the appointment of the receiver or possession being taken —"in course of being wound up, the debts which in every

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winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts "—that is a reference to s. 209—" shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

It is said by Mr. Grant that that language, if it is read literally and without importing into it any word which is not actually there, means this, and means this only, and I think he goes so far as to say cannot mean anything else, that is, that " any assets coming to the hands of the receiver " covers all assets that may come to the hands of the receiver or other person taking possession derived from the debenture, whether in respect of the fixed charge or whether in respect of the floating charge.

Now I very much doubt in the first place whether it is true to say that that meaning can be got out of it by reading the words literally. It seems to me that you do have to put some limitation upon the phrase " any assets," because it obviously cannot mean " any " assets. You do have to imply something in the nature of " coming to the hands of the receiver as such " or " coming to the hands of the other person taking possession in respect of the assets of which he takes possession." But if you are bound to introduce some limitation, the question is whether that is the proper limitation, and reading the section as a whole, I feel no doubt myself that the limitation which ought to be introduced is the limitation of " assets coming to the hands of the receiver or other person taking possession subject to the floating charge," or some such words as that. The words, " or other person taking possession as aforesaid," refer back to the words " or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge," and if I am right in saying that " the charge " must mean " the floating charge," because the floating charge is the only antecedent in the sentence to which " the charge " can refer, then the words " other person taking possession as

aforesaid" must mean "other person taking possession as aforesaid, of assets comprised in the floating charge," and "assets" there, in the direction for payment, must mean "assets representing assets comprised in the floating charge." It seems to me to follow inevitably from that. My conclusion, therefore, is, upon the language of this section, read in vacuo, that on its true construction, the priority given is a priority given in respect of assets derived from the subject of the floating charge, and not in respect of assets which are subject to the fixed charge.

Having arrived at that conclusion, although it may be a question whether or not I am entitled to look at s. 209 for the purpose of construing s. 107, yet I am quite sure that having construed s. 107, I may be permitted to look at s. 209 to derive comfort; and doing that, I certainly do derive comfort, for I find that in the case of a winding up the provision there is quite clear in the case of a company. Sect. 209 says: "(2.) The foregoing debts shall . . . . (*b*) in the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge." So that it is plain in terms in s. 209, that in the case of winding up, the priority is only given in relation to assets which are subject to the floating charge. In the view I take the same result follows in the case of a debenture holders' action where there is no winding up. Mr. Grant says there are reasons why it should be otherwise. I am not sure that I am satisfied that any such reasons exist at all. I quite understand that in regard to a floating charge there may be a reason for giving the priority, because until the receiver is appointed or possession is taken, the charge does not crystallise, and it may well be said that this particular class of debts, which may perhaps have contributed to produce the very assets upon which the floating charge will crystallise, are proper to be paid out of those assets before the debenture holder takes his principal

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and interest out of them. That seems to me to be a perfectly intelligible reason for the legislation, and is in accord with the view which I take of the section.

I ought, perhaps, to say one word upon Mr. Grant's argument with regard to the Workmen's Compensation Act, 1925, s. 7. That is a section, of course, which only deals with the particular class of debt which is given priority; the section does not affect the circumstances in which the class of debt is given priority. With regard to sub-s. 3 of that section, where it says: "There shall be included amongst the debts which . . . . (iii.) under s. 107 of the Companies (Consolidation) Act, 1908, are to be paid in priority to any claim for principal or interest in respect of debentures; the amount due in respect of any compensation or liability for compensation accrued before the following date, that is to say . . . . (*c*) in the third case the date of the appointment of the receiver or of possession being taken mentioned in the said section 107," Mr. Grant's argument is that the phrase, "are to be paid in priority to any claim for principal or interest in respect of debentures," is either an interpretation of s. 107, and means, "are to be paid in priority to any claim for principal or interest under the debentures in respect of all the assets whether the subject of a fixed charge or a floating charge," that is either an interpretation in the sense of declaratory of what the section really means, or else it is an alteration of the law.

Now, it does not seem to me to be either the one or the other. In the first place it does not seem to mean what Mr. Grant suggests it means. All the section says is, "which under s. 107 . . . ., are to be paid in priority to any claim for principal or interest in respect of debentures." It is only identifying the class of debts which the section is dealing with, that is to say, the class of debts in which is to be included the amount due in respect of compensation. It is a description of a class. It is not conferring any rights or making any alteration in the law in respect of the circumstances in which that priority is given, and it would be impossible, in my view, either to treat that as an interpretation, in the sense

which Mr. Grant desires, of the earlier section, or as a substantive alteration of the law under s. 107. It seems to me to be neither the one nor the other.

My conclusion, therefore, is that on the true construction of this s. 107, the priority to the class of debts which are given priority in these cases is a priority only in respect of those assets which are subject to the floating charge, and I propose to declare accordingly.

A. R. T.

C. A.

F. Densley appealed. The appeal was heard on December 6, 1928.

Upjohn K.C., *A. Grant K.C.* and *L. W. Byrne* for the appellant. Sect. 107, sub-s. 1, of the Companies (Consolidation) Act, 1908, applies to every debenture containing a floating charge, and where a debenture contains a fixed charge and a floating charge there is no ground for distinguishing between the assets subject to the fixed charge and those subject to the floating charge. All the assets charged are affected by s. 107, as the debenture contains a floating charge. Regard ought not to be had to s. 209 of the Act, which deals with the case where there is a winding up, and s. 107, which applies when a receiver has been appointed, but there is no winding up, stands by itself. Sect. 209 only gives priority to preferential payments as regards assets subject to a floating charge, but s. 107 is in different language. Under s. 107, sub-s. 1, provision is made for payment of preferential payments out of "any assets coming to the hands of the receiver." This view of s. 107, sub-s. 1, receives emphasis from the Workmen's Compensation Act, 1925, s. 7, sub-s. 3, which provides that there shall be included amongst the debts which under s. 107 are "to be paid in priority to any claim for principal or interest in respect of debentures," the amount due in respect of compensation. Sect. 209 of the Act of 1908 shows that when it was intended to limit priority for preferential payments to assets the subject of a floating charge, that could be made perfectly clear. The language of s. 107 may be contrasted.

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Under s. 107 the only condition precedent is that the debenture shall contain a floating charge, and when that is so, preferential payments are payable in priority out of all the assets coming to the receiver's hands.

[RUSSELL L.J. Would there be any objection to appointing one receiver of the property subject to the fixed charge and another of the property subject to the floating charge ?]

That is not what has been done here. When the language of s. 107 is compared with that of the Preferential Payments in Bankruptcy Amendment Act, 1897, s. 3, it is seen that there has been an enlargement. The words "the charge" are used instead of "such charge."

[LORD HANWORTH M.R. There is only one charge referred to in the section, and that is the floating charge.]

The words of s. 107 are really clear if s. 209 be disregarded. The preferential payments are to be made out of any assets coming to the hand of the receiver, and that can only mean all assets coming to his hand as receiver.

H. C. Bischoff and *J. R. McCrindle* for the respondents were not called upon.

LORD HANWORTH M.R. This is an appeal from a judgment of Tomlin J. delivered on July 18 last upon a summons which was taken out to obtain a declaration as to the effect of s. 107 of the Companies (Consolidation) Act, 1908, in reference to the facts of the particular case. The defendant company issued a debenture which gave a fixed charge and a floating charge. The company is not being wound up, but a receiver has been appointed by the debenture holders.

By the summons which came before Tomlin J. he was asked to make: "A declaration that the preferential payments required by s. 107 of the Companies (Consolidation) Act, 1908, to be paid in priority to all other debts of the defendant company, are payable only out of such assets of the defendant company as are comprised in or subject to the floating charge created by the first debenture of the defendant company dated January 18, 1924, and held by the plaintiff bank, and are not payable in priority to the

moneys secured by the said debenture out of such assets of the defendant company as are comprised in or subject to the fixed first charge created by the said debenture." Tomlin J. in effect granted this declaration, and from that decision this appeal is brought.

The appeal is on behalf of those who are entitled to preferential treatment in respect of their claims under the Workmen's Compensation Act. The question which we have to determine turns on the true construction of s. 107 of the Companies (Consolidation) Act. I agree with counsel for the appellants that inasmuch as s. 209 deals with the case where there is a winding-up order, it may be unwise to look at the system provided under s. 209 in order by analogy to determine what is intended in s. 107. It appears to me that s. 107 must be interpreted according to its terms and without its being affected by the terms of s. 209, which deals with the case where there is a winding up. Sect. 107 applies in this case, because there has been a receiver appointed, but no winding up. Sect. 107, sub-s. 1, is in these terms: "Where in the case of a company registered in England, ... a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures." Now what is the meaning of these words: "those debenture holders" and "subject to the charge"? What are the assets that are referred to? It appears to me, for the reasons which are very clearly set out in the judgment of Tomlin J., that s. 107 applies to assets subject to a floating charge and not to assets subject to a fixed charge so as to give priority to the fixed charge.

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It is, I think, admitted on all hands that the words "any assets" in the section must have some limitation. It must at least mean "any assets which come to the hands of the receiver properly in his character as receiver." Then, what are the assets which he is entitled to receive? He is appointed under the powers contained in the first debenture, and possession is taken on behalf of the holders of that debenture, which is secured by fixed charge and a floating charge, and he takes possession of property which is comprised in or subject to both charges. But s. 107 is only directed to debentures secured by a floating charge, so that when one comes to the words "any assets" it must mean such assets as are subject to a floating charge which the receiver receives in his character of receiver. It is in respect of those assets that a duty is imposed upon him to deal with them in a particular way.

Tomlin J. has stated all the relevant facts and dealt with the matter quite fully: I, therefore, do not think it necessary to add anything further, except to say that for the reasons which I have given in addition to those he has expressed, I am in agreement with his judgment, and this appeal must be dismissed.

LAWRENCE L.J. I am of the same opinion, and I am content to rest my judgment on the reasons given by Tomlin J., with which I agree. Sect. 107 is directed specifically to debentures secured by a floating charge and to those only, and intended to provide for the payment out of the assets subject to the floating charge of those debts which, under the provisions of s. 209, would be entitled to priority in the case of a winding up, in priority to the claims of the debenture holders under the floating charge. In my judgment the fact that the debenture in the present case is one which combines with the floating charge, a fixed charge does not bring the section into operation as against the assets comprised in the fixed charge. Such assets are outside the scope and purview of the section.

RUSSELL L.J. I agree, and I desire to add nothing to the judgment of Tomlin J.

Appeal dismissed.

Solicitors for the appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for the respondent: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff.*

Solicitors for Rhondda Urban District Council: *Gibson & Weldon, for D. J. Jones, Pentre, Rhondda.*

H. C. G.

ATTORNEY-GENERAL *v.* LONDON AND HOME COUNTIES JOINT ELECTRICITY AUTHORITY.

[1929. A. 135.]

Electricity—Joint Electricity Authority—Statutory Body—Scheme—Definite District—Definite Powers—Power to promote "any" Bill for "the purposes of this Scheme"—Bill to extend District and Powers—Ultra vires—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *ss.* 5, 6, 7, 8, 12, 13, 28—*Electricity (Supply) Act*, 1922 (12 & 13 *Geo.* 5, *c.* 46), *ss.* 5, 15—*Electric Lighting (Clauses) Act*, 1899 (62 & 63 *Vict. c.* 19), *Schedule, cl.* 4, *sub-cl.* 2.

The defendants were a statutory body incorporated on July 29, 1925, by the Electricity Commissioners under the Electricity (Supply) Act, 1919, and a Scheme made thereunder. This Scheme strictly defined their district and gave them only some of the powers available under the Electricity (Supply) Acts; but clause 10 authorized them to promote "any" Bill "for the purposes of this Scheme":—

Held, that the defendants, as a purely statutory body, were strictly bound by their Scheme, and were neither expressly nor impliedly authorized by their Scheme or the Acts to expend their funds in promoting a Bill for the improvement of their Scheme by enlarging their district, or by obtaining additional powers omitted from their Scheme, though adumbrated in the Acts.

Attorney-General v. *Andrews* (1850) 2 Mac. & G. 225; *Attorney-General* v. *Eastlake* (1853) 11 Hare, 205; *Attorney-General* v. *West Hartlepool Improvement Commissioners* (1870) L. R. 10 Eq. 152; *Attorney-General* v. *West Riding Rivers Board* (1905) 3 L. G. R. 764; and *Rex* v. *Electricity Commissioners* [1924] 1 K. B. 171 applied.

MOTION.

The defendants were incorporated under the above name by the London and Home Counties Electricity District Order,

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1925, and clause 2 of the Scheme thereby effected. The Order was made by the Electricity Commissioners, confirmed by the Minister of Transport, and approved by resolution of each House of Parliament under the Electricity (Supply) Act, 1919, ss. 5, 6, 7. (1) It came into operation on July 29, 1925.

(1) The Electricity (Supply) Act, 1919, as amended by the Acts of 1922 and 1926, provides as follows:—

Sect. 5, sub-s. 1: "The Electricity Commissioners may provisionally determine that any district in the United Kingdom shall be constituted a separate electricity district for the purposes of this Act, and, in considering what areas are to be included in a district, areas shall be grouped in such manner as may seem to the Commissioners most conducive to the efficiency and economy of the supply of electricity and to convenience of administration. Before finally determining the area of any such district, the Electricity Commissioners shall publish notice of their intention so to do and of the area proposed to be included in such district, and shall also give notice thereof to all county councils, local authorities, and authorised undertakers any part of whose county district or area of supply is proposed to be included in the electricity district, and, if any objection or representation be made on account of the inclusion in or the exclusion from the proposed district of any area, the Electricity Commissioners shall hold a local inquiry with reference to the area to be included in the proposed district:

"Provided that, where a local inquiry is held as hereinafter provided regarding the improvement of the organisation of the supply of electricity in any district, the area of that district shall not be finally determined until after that inquiry has been held."

Sub-s. 2: "Where it appears to the Electricity Commissioners with respect to any electricity district so provisionally determined that the existing organisation for the supply of electricity therein should be improved, the Commissioners shall give notice of their intention to hold a local inquiry into the matter, and shall give to authorised undertakers, county councils, local authorities, railway companies using or proposing to use electricity for traction purposes, large consumers of electricity, and other associations or bodies within the district which appear to the Commissioners to be interested, an opportunity to submit, within such time as the Commissioners may allow, a scheme or schemes for effecting such improvement, including proposals for altering or adjusting the boundaries of the district and, where necessary, the formation of a joint electricity authority or other body for the district."

Sub-s. 3: "If no such scheme is submitted within the time so allowed, or if no scheme submitted is approved by the Commissioners, the Commissioners may themselves formulate such a scheme."

Sect. 6, sub-s. 1: "A scheme under the last-foregoing section may provide for the establishment and (where desirable) the incorporation with power to hold land without licence in mortmain, of a joint electricity authority representative of authorised undertakers within the electricity district, either with or without the addition of representatives

By this Scheme (clause 1) the administrative counties of London and Middlesex, the county boroughs of Croydon, East Ham and West Ham, and certain areas in the administrative counties of Berks, Buckingham, Essex, Hertford, Kent and Surrey were constituted a separate Electricity District for the purposes of the Electricity (Supply) Acts, 1882 to 1922, by the name of the London and Home Counties Electricity District, and that district was finally determined by cl. 3 of the Order establishing the Scheme.

Clause 2 of the Scheme incorporated the defendants under the above name.

Clause 3 provided that the Joint Authority should consist of thirty-three members to be appointed by various bodies mentioned in Annex 1.

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of the council of any county situate wholly or partly within the electricity district, local authorities, large consumers of electricity, and other interests, including the persons employed in connection with the supply of electricity, within the electricity district, and, subject as hereinafter in this Act provided, for the exercise by that authority of all or any of the powers of the authorised undertakers within the electricity district, and for the transfer to the authority of the whole or any part of the undertakings of any of those undertakers, upon such terms as may be provided by the scheme, and the scheme may contain any consequential, incidental, and supplemental provisions which appear to be expedient or proper for the purpose of the scheme, including provisions determining the area included in the electricity district, and the conditions of employment of persons employed by the joint electricity authority:

"Provided that no such scheme shall provide for the transfer to the authority of any part of an undertaking except with the consent of the owners thereof."

Sub-s. 2: "The scheme may provide for enabling the joint electricity authority to delegate, with or without restrictions, to committees of the authority any of the powers or duties of the authority, and for the payment out of the revenues of the authority of travelling and subsistence expenses of members of the authority, and reasonable compensation for loss of remunerative time."

Sect. 7, sub-s. 1: "The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade, who may confirm the order either without modification or subject to such modifications as they think fit."

Sub-s. 2: "Any such order shall be laid, as soon as may be after it is confirmed before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed

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By clause 4 the defendants might appoint such officers and servants at such remuneration as they might determine.

By clause 5 the defendants might pay the chairman such remuneration as the Commissioners approved and pay travelling and subsistence expenses to the members.

By clause 10 the defendants should "for the purposes of this Scheme" have "power to promote or oppose any Bill in Parliament."

By clause 11 the defendants might institute or defend legal proceedings.

By clause 33 the defendants, subject to the provisions of the Electricity (Supply) Act, 1922, and the regulations made thereunder, might borrow up to seven millions 'for the purposes of this Scheme."

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by each such House, and when so approved shall have effect as if enacted in this Act."

Sub-s. 3 "An order made under this section may be altered by a subsequent order made, confirmed, and approved in like manner as the original order."

Sect. 8, sub-s. 1: "It shall be the duty of every joint electricity authority constituted under this Act to provide or secure the provision of a cheap and abundant supply of electricity within their district, and for that purpose every such authority hall have such powers and duties as are conferred or imposed upon them by the scheme under which they are constituted or by this Act with respect to—

(*a*) The supply of electricity within their district. . . . .

(*b*) The acquisition of the undertakings or parts of the undertakings of authorised undertakers;

and such powers incidental thereto, as are in the scheme or in this Act mentioned, and every such authority shall comply with any general directions given to them by the Electricity Commissioners as to the exercise and performance of their powers and duties."

Sect. 12, sub-s. 1: "A joint electricity authority shall have power to supply electricity within their district subject to the following limitations. . . . ."

Sub-s. 2: "This Act shall, in relation to every joint electricity authority, be deemed to be a special Act for the purposes of the Electric Lighting Acts, and every joint electricity authority shall be deemed to be undertakers within the meaning of those Acts, and for the purposes of this section there shall be incorporated with this Act the provisions of the Schedule to the Electric Lighting (Clauses) Act, 1899, subject to such exceptions and modifications as may be prescribed by the order constituting the joint electricity authority."

Sect. 13, sub-s. 1: "Any local authority being authorised distributors may, with the consent of the Electricity Commissioners, agree with the joint electricity authority of the

By clause 35 all moneys borrowed otherwise than as advances by way of temporary loans were to be applied to the purpose for which they were borrowed and to which capital was properly applicable.

Clause 36 provided that capital moneys should be applied to the discharge of loans or other capital purposes.

By clause 37, sub-clause 1, save as thereinbefore provided, all moneys received by the defendants in respect of their

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district in which the area of supply of the local authority or any part thereof is situated for the transfer to the joint electricity authority of the whole or any part of the undertaking of the local authority within that district: . . . ."

Sub-s. 2: "Where under the Electric Lighting Acts, or under any order made thereunder or under any special or local Act, any right to purchase the whole or any part of the undertaking of any authorised distributors is vested in any local authority (including a county council), the right may, by any order under this Act constituting a joint electricity authority for the district comprising the area of the local authority, or by any amending order under s. 7 of this Act be transferred to and vested in the joint electricity authority, subject to the order providing for adequate representation on the joint electricity authority of the local authority from whom the right is transferred, and, on any such right being so transferred, the Order or Act conferring the right shall be construed accordingly, and any question as to the adequacy of such representation shall be determined by the Electricity Commissioners."

Sect. 28, sub-s. 1: "Every joint electricity authority shall establish a fund to which all receipts by the authority shall be carried, and out of which all payments by the authority shall be made."

Sub-s. 2: "Every joint electricity authority shall annually, at such time as the Electricity Commissioners may fix, submit to the Electricity Commissioners such a statement of income and expenditure on revenue account as the Electricity Commissioners may require."

Sub-s. 3: "The accounts of every joint electricity authority and their officers shall be audited by auditors appointed by the Electricity Commissioners, and the audit shall be conducted in accordance with such regulations as may be prescribed by the Electricity Commissioners, and the regulations may apply with the necessary modifications the provisions relating to the accounts and audit of accounts of county councils and their officers."

Sub-s. 4: "Every joint electricity authority shall, annually at such date and in such form as the Electricity Commissioners may prescribe, make to the Electricity Commissioners a report of their proceedings during the preceding year."

Sect. 39 transferred the Board of Trade's powers to the Minister of Transport.

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undertaking should be applied in the manner and order following—namely :—

(*a*) In payment of the working and establishment expenses and cost of maintenance of the undertaking, including costs, expenses, penalties and damages payable by the defendants consequent upon any proceedings by or against the defendants, and the payment of any superannuation allowances and gratuities under any scheme established under the Electricity (Supply) Act, 1919, s. 8.

(*b*) In payment of the interest or dividend on any mortgages, stock, or other securities granted and issued by the defendants in respect of money borrowed or on any temporary loan.

(*c*) In providing any instalments or sinking fund required to be provided in respect of money borrowed.

(*d*) In payment of all other expenses in carrying out the defendants' powers and duties under the Electricity (Supply) Acts, 1882 to 1922, or this Scheme, not being expenses properly chargeable to capital.

By sub-clause 2 the defendants might provide a reserve fund, and by sub-clause 4 any surplus income should be applied in manner from time to time approved by the Commissioners for reducing charges to undertakers and other persons taking electricity from the defendants.

By clause 38 the defendants were to keep proper books of account and annually furnish a copy to every constituent authority.

By clause 39, sub-clause 1, the defendants should at the beginning of each financial year prepare an estimate of their receipts and expenses for that year showing the "receipts and expenses in respect of the supply of electricity" and the "administrative expenses" and submit such estimate for approval to the Commissioners.

By sub-clause 2 (*a*) the London County Council and certain other bodies were authorized to pay certain contributions to the administrative expenses, and (*b*) the amount of the estimate of the administrative expenses so approved (exclusive of any proportion properly chargeable to supply) which was not to be met out of the aforesaid contribution should

be apportioned by the defendants amongst the authorized undertakers in the district represented on the defendant Authority in the proportions therein mentioned.

Neither the Order nor the Scheme transferred to the defendants any local authority's right to purchase the whole or any part of the undertaking of any authorized distributors, and notwithstanding that the defendants were constituted a joint electricity authority, every such right to purchase any undertaking outside the administrative county of London remained vested in the local authority of the district where the undertaking was situate.

By agreement between the companies owning undertakings within the administrative county of London and the London County Council special provisions had been made for vesting those undertakings in the defendants in 1971 and given effect to in the London Electricity No. 1 Act, 1925 (15 & 16 Geo. 5, cap. lxii.), and the London Electricity No. 2 Act, 1925 (15 & 16 Geo. 5, cap. lxiii.), the Bills for which Acts were promoted by the companies.

The defendants were promoting a Bill intituled "A Bill to transfer to [the defendants] the powers of local authorities to acquire electricity undertakings in their district, to extend such district, to confer further powers upon [the defendants], and for other purposes."

This Bill in fact sought (s. 4) to extend the district so as to include further areas in the administrative counties of Buckingham, Essex, Hertford and Surrey, and part of Sussex.

It also sought (ss. 5 to 9) to transfer to the defendants the local authorities' rights to purchase undertakings in their district, and to constitute the defendants the purchasing authority under the Electric Lighting Act, 1888, s. 2, in respect of any undertaking authorized by any special Act or Order coming into operation after November 1, 1928.

It also sought (s. 10) to give local authorities whose rights of purchase were so transferred representation on the defendant Authority, just as if they were authorized undertakers.

It also sought (s. 11) to authorize the defendants to divide the district into areas with a scheme for each area providing

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for the appointment of a joint committee comprising representatives of the defendants and the local authority of that area and for the delegation of the defendants' powers and duties in relation to that area to that joint committee.

It also sought (s. 12) to enable the defendants to enter into agreements with (inter alia) local authorities for the exercise and performance of the defendants' powers and duties.

It also sought (s. 13) to enable the defendants to advance money to any company whose undertaking they had a right to purchase at a future date for the purpose of developing that undertaking.

It also sought (s. 14) to make the defendants authorized undertakers represented on their own body in respect of undertakings acquired by them under the proposed Act, for the purpose of the 1925 Order, cl. 39, sub-cl. 2 (*b*), which apportioned the defendants' administrative expenses on those undertakers and by ss. 15 and 16 it made certain consequential provisions for expenses and costs.

The relators, who were also plaintiffs, submitted that the Bill was not promoted for any of the purposes of the Scheme, and that the defendants' expenditure on that promotion was ultra vires.

The plaintiffs were authorized undertakers in the district. They were represented on the defendant Authority, and as such were liable to contribute towards the administrative expenses. They were also the owners of undertakings authorized by Orders mentioned in the Bill.

The defendants had at present no electricity supply undertaking and were not supplying electricity to any one in any area. They had no revenue except from the contributions to their administrative expenses payable under the Scheme, clause 39.

For the year ending March 31, 1928, the authorized undertakers' contribution to administrative expenses was 16,195*l*. The promotion of the Bill would be extremely expensive, and the cost would largely fall on the relators.

On January 19, 1929, the plaintiffs commenced this action, and on January 21 they issued a notice of motion to restrain

the defendants until judgment or further order from applying their funds in the preparation or promotion of the Bill or otherwise in relation thereto and from employing at their expense or upon their credit any of their officers or servants or other persons in the preparation or promotion of the Bill or otherwise in relation thereto unless and until authorized by Parliament so to do.

Tyldesley Jones K.C., *Wilfrid Greene K.C.* and *Stafford Crossman* for the plaintiffs. The former practice as to supplying electricity under a Provisional Order will be found in the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), ss. 3, 4; the Electric Lighting Act, 1888 (51 & 52 Vict. c. 12), s. 2; and the Electric Lighting Act, 1909 (9 Edw. 7, c. 34), ss. 7, 8.

The 1919 Act made a new departure. It set up Electricity Commissioners and enabled them to constitute a separate electricity district, make a scheme therefor, and by that scheme to appoint a joint electricity authority to carry out that scheme. The defendants were so appointed. They are a statutory body corporate created by the Commissioners under ss. 5, 6, 7, and have only the limited powers given them by the Scheme and the Acts in the district thereby defined.

The Commissioners have wider powers. They could alter the Scheme under s. 7, sub-s. 3, e.g., by extending the district, or by transferring under s. 13, sub-s. 2, the local authorities' rights to purchase undertakings (a transfer deliberately omitted from the Scheme), but not even the Commissioners could make a scheme compelling delegation of the defendants' powers, as proposed in the present Bill. That would be contrary to s. 6, sub-s. 2, and to *Rex* v. *Electricity Commissioners*. (1)

The defendants, on the other hand, as a mere statutory body, are strictly limited by their Scheme and the Acts: *Wenlock* v. *River Dee Co.* (2); and though clause 10 of the Scheme expressly authorizes them to promote any Bill "for the purposes of this Scheme," e.g., compulsory acquisition of

(1) [1924] 1 K. B. 171. (2) (1885) 10 App. Cas. 354, 362.

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land for a generating station, it does not authorize them to promote a Bill to alter the Scheme in any way they think advisable, and neither the Scheme nor the Acts contain any implied authority in that behalf. The defendants therefore cannot apply their funds for this purpose: *Attorney-General* v. *Andrews* (1); *Attorney-General* v. *Eastlake* (2); *Attorney-General* v. *West Hartlepool Improvement Commissioners* (3); *Attorney-General* v. *West Riding Rivers Board* (4); *Attorney-General* v. *Lambeth Vestry.* (5)

Hon. Stafford Cripps K.C. and *S. G. Turner* for the defendants. We do not dispute the authorities. They merely decide that if the incorporating document devotes the defendants' funds to specific purposes, and they have no power, express or implied, to vary the terms of that document, they cannot apply their funds in promoting a Bill for that purpose.

The distinction is well illustrated in *Attorney-General* v. *Norwich Corporation* (6), where the application of the borough fund was restrained, but the application of the tonnage dues was allowed.

[ASTBURY J. That was a municipal corporation with common law powers. The defendants are merely a statutory corporation with statutory powers only.]

Not even a common law corporation can misapply trust funds devoted to a specific purpose. The only question is whether they are so devoted.

Now here no doubt the funds are initially devoted to the purposes of the Acts selected and specified in the Scheme. But clause 10 authorizes the defendants to promote "any" Bill "for the purposes of this Scheme." If that limits the Bill to the purposes already contained in the Scheme, it would be practically otiose. It must surely include the purposes of the Acts under which the Scheme is made.

Now the main purpose of the Acts is the efficiency and economy of supply, the convenience of administration and

(1) 2 Mac. & G. 225, 228, 230.
(2) 11 Hare, 205, 223, 224.
(3) L. R. 10 Eq. 152.
(4) 3 L. G. R. 764, 770.
(5) (1888) 4 Times L. R. 257, 258*a*.
(6) (1851) 21 L. J. (Ch.) 139.

the improvement of any existing organization. This appears from the 1919 Act, s. 5.

Under s. 6 the Scheme creating the joint authority may provide for the transfer of the whole or any part of any undertaking in the district, but a transfer of only a part requires the owners' consent.

Under s. 7, sub-s. 2, the Order confirming the Scheme when approved by each House of Parliament becomes part of the Act, subject to the Commissioners' power of alteration under sub-s. 3. It is quite clear that a possible subsequent alteration is contemplated, and the Electricity (Supply) Act, 1926 (16 & 17 Geo. 5, c. 51), s. 38, calls it "Amendment of Schemes." Why should not an alteration be obtained by a Bill instead of by the cumbrous procedure under s. 7, sub-s. 3?

Under s. 8, sub-s. 1, it is the defendants' duty to provide or secure a cheap and abundant supply of electricity within their district, and for that purpose they have powers conferred by the Scheme "or by this Act" with respect to the supply of electricity or the acquisition of authorized undertakings and "such powers incidental thereto" as are "in the Scheme or in this Act" mentioned. Surely a power to promote a Bill for improving the Scheme comes within the latter words.

Under s. 13, sub-s. 2, the local authorities' right to purchase undertakings might have been transferred to the defendants. Whether the transfer was considered premature, or omitted per incuriam is immaterial. It is exactly the class of thing that clause 10 was intended to meet.

Sect. 12, sub-s. 1, and indeed the Scheme itself incorporates the Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19). The Schedule, clause 4, sub-clause 2, provides that the defendants shall not supply energy beyond the area of supply "otherwise than under the authority of Parliament." That is a clear intimation that they may go to Parliament for that purpose, and if so, they can apply their funds therefor.

The 1922 Act, s. 15, recognizes the authorization of certain things by "special order." This impliedly gives the defendants authority to apply for such a special Order.

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There is one other point. The defendants have really three funds—namely, capital fund, supply fund, and administrative fund. Of course they all go to one account under the 1919 Act, s. 28, sub-s. 1, but for book-keeping and application purposes they are distinct funds. Capital is allocated to capital expenses under the Scheme, clause 36, and reading clauses 37 and 39 together it is manifest that the supply fund is specially allocated. But no express limitation is placed on the administrative funds, and no limitation inconsistent with the general tenor of the Acts ought to be implied. Administrative expenses were first separately dealt with in the 1922 Act, s. 5, sub-s. 1, which is carried out by clause 39 of the Scheme.

The defendants can therefore certainly apply this fund in promoting their Bill.

Tyldesley Jones K.C. in reply.

J. H. Stamp and *David Ll. Jenkins* watched the case on behalf of ten London Electric Supply Companies.

ASTBURY J. [after stating the facts:] Under the Electric Lighting Act, 1882, ss. 3, 4, local authorities and companies were authorized to supply electricity as therein provided. By the Electric Lighting Act, 1888, s. 2, provision was made for the purchase of undertakings within their areas by local authorities, and by the Electric Lighting Act, 1909, ss. 7, 8, provisions were made with regard to stations outside their areas, and as to the exercise of powers by two or more authorities jointly.

The Electricity (Supply) Act, 1919, is however the principal statute on which this motion turns. By s. 1, sub-s. 1, Electricity Commissioners were set up for promoting, regulating, and supervising the control of electricity. [His Lordship then read s. 5, sub-ss. 1, 2, 3; s. 6, sub-ss. 1, 2; and s. 7, sub-ss. 1, 2, 3.] The proviso in s. 6, sub-s. 1, that no Scheme shall provide for the transfer to the joint authority of any part of an undertaking except with the consent of the owners thereof is of great importance, and with regard to s. 7, sub-s. 3, enabling alteration of an Order, it is to be noticed that the original Order must be originated by the

Commissioners. The defendant Authority, its district, and the Scheme regulating its operations all came into being as a result of complying with ss. 5, 6, 7.

Sect. 8, largely relied on by the defendants, is of great importance. [His Lordship read s. 8, sub-ss. 1, 2; and s. 13, sub-ss. 1, 2.] Sect. 13, sub-s. 2, is in effect a provision that an Order under this Act may provide that the right of purchase vested in local authorities may be transferred to the joint electricity authority, if and when it is set up.

Now that right was not transferred to the defendants. The local inquiries were held, the powers and duties to be vested in the defendants discussed, and the district finally determined, but the transfer of the local authorities' right to purchase undertakings was deliberately withheld. This is one of the matters that the Bill seeks to alter.

Sect. 17 deals with the defendants' capital expenditure. I need not pause to consider that. Sect. 28 deals with revenue and expenditure. [His Lordship read s. 28, sub-ss. 1, 2.]

By the Electricity (Supply) Act, 1922, s. 5, sub-s. 4: "A scheme under the principal Act constituting a joint electricity authority or other body for the improvement of the organisation of the supply of electricity in any electricity district may include provisions authorising or requiring authorised undertakers, and authorising companies and other bodies represented, on the authority or body to contribute towards any administrative expenses of the authority or body."

The defendants contend that this is the first provision made with regard to administrative expenses. That is inaccurate. All the sub-section does is to provide a means by which the authorized undertakers in a district may be compelled to contribute towards the defendants' administrative expenses. Before that date these authorities could be set up, and their rights defined, but they had not been given power to levy contributions in respect of their administrative expenses. That is all that this sub-section enacts.

By the 1922 Act, s. 15: "The powers and duties as to the generation and supply of electricity conferred and imposed by or under the principal Act or this Act on joint electricity

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authorities may be exercised and performed by any such authority either by themselves or, if so authorised by the order establishing that authority or by special order, through any authorised undertakers; and, where any such authority acts through any such undertakers, the undertakers shall have, to such extent as may be provided by such order as aforesaid, the powers and duties of the authority under the principal Act and this Act."

I only read that section for this purpose. It provides that the powers and duties therein mentioned may be exercised and performed by the defendants either by themselves or through any authorized undertakers "if so authorised" by the Order establishing them as the authority or "by special order." This is one of the several cases where the defendants contend that they have an implied right to take proceedings to obtain an Act or a special Order and to spend money in that behalf. The section does nothing of the kind. It merely says that if the defendants are authorized by their own Order or a special Order, they may do certain things. It in no way implies that if not so authorized they may spend their money in obtaining that authorization.

The Scheme embodied in the Order is now operative. The Order contains recitals referring to the area finally included in the district, the constituent companies, and the Commissioners' opinion on the advisability of the Scheme arrived at. The operative part defines and finally determines the district and establishes the Joint Authority. The district is very wide, containing areas in many counties. The Scheme provides for the remuneration of the defendants' officers and for the appointment of committees.

Clause 10 provides that the defendants shall "for the purposes of this Scheme" have power to promote or oppose any Bill in Parliament. The defendants rely principally upon this clause as expressly authorizing them to promote their present Bill. But they are in this difficulty. They must either establish that their Bill is "for the purposes of this Scheme" within clause 10 or that they have otherwise implied authority to promote it.

Now the Bill shortly provides as follows :—

Sect. 4 extends the district.

Sects. 5 to 10 provide for the transfer to the defendants of local authorities' rights. This transfer might have been included in the Scheme under the 1919 Act, s. 13, but was not included.

Sect. 11 provides for the delegation of certain powers to certain committees not being committees of the defendants solely, as authorized by the Scheme.

Sect. 12 gives the defendants and any authorized undertakers or local authorities power to enter into and effect agreements as therein mentioned. This would include local authorities who are not authorized undertakers.

Sect. 13 provides that the defendants shall have power to advance money by way of loan to companies whose undertakings they have power to purchase.

Sects. 15, 16 provide for certain consequential expenses and costs.

In my opinion the defendants have no power to expend their funds in promoting a Bill like this. In other words they have no right to levy the costs upon their constituent members, many of whom have opposed the Bill. If the Bill goes through, those constituent members will have to pay their share of the promotion costs, and the whole of their opposition costs.

Each set of sections of the Bill is outside the purposes of the Scheme. It is hardly incidental to a Scheme strictly limiting the defendants' district to promote a Bill for getting rid of that limitation. Again a provision giving powers of purchase which might have been included in the Scheme, but was excluded, is a provision not for the purposes but for alteration of the Scheme. The same remark applies to the other provisions. Sect. 11 is contrary both to the Scheme and to the 1919 Act, s. 6, sub-s. 2, and to *Rex* v. *Electricity Commissioners*. (1) Sects. 12 and 13 are outside both the Scheme and the Act. Therefore the consequential sections with regard to expenses are similarly not for the purposes

(1) [1924] 1 K. B. 171.

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of the Scheme; and generally this is not the promotion of a Bill for the purposes of the Scheme within clause 10.

The defendants then contend that if this is not a Bill within the express powers of clause 10, it is a Bill which under the Act and the Scheme read together the defendants have implied authority to promote. That is a difficult proposition to establish in the face of an express power to promote a Bill of a particular character. But I will nevertheless deal with the implied authority contention.

I have already said that the 1922 Act, s. 15, gives the defendants no implied authority to obtain a special Order of the character therein mentioned.

The defendants then contend that the 1919 Act, s. 7, sub-s. 3, which enables an Order made under the section to be altered by a subsequent Order "made, confirmed, and approved in like manner as the original order" impliedly authorizes them to promote a Bill for that purpose. They say that if authority can be obtained by an amending Order under s. 7, sub-s. 3, it can equally be obtained by Act of Parliament. That argument is hopeless. Sect. 7, sub-s. 3, means that the original Order may be altered by the Commissioners after local inquiries, etc. It does not mean the exact opposite.

The defendants then contend that as the Electric Lighting (Clauses) Act, 1899, Schedule, cl. 4, sub-cl. 2, which must be read with the 1919 Act, forbids them to go outside their area "otherwise than under the authority of Parliament" it impliedly authorizes them to obtain Parliamentary authority ad hoc. That contention is equally hopeless.

The result is that the defendants' district and powers are fixed and determined by their Order and Scheme. They have power to promote a Bill for the purposes of that Scheme, but they have no authority to promote a Bill for purposes outside the Scheme, or to expend their funds in such a promotion.

The defendants contend that the phrase "purposes of this scheme" in cl. 10 ought to be read in a wide sense. They ought not to be confined to the four corners of the document,

but be construed to include the general purposes of the 1919 Act which set up these joint authorities. They rely mainly on the 1919 Act, s. 8, sub-s. 1. [His Lordship read the sub-section.] They say that as they are under a statutory duty to supply cheap and abundant electricity and can exercise powers given by the Scheme or the Act for that purpose, the purposes of the Scheme include the statutory powers.

In a sense that is true, but not in the defendants' sense. For instance, the Bill transfers the local authorities' rights to purchase undertakings to the defendants. The defendants say they may exercise any powers and duties conferred by the Scheme or the Act for the acquisition of these undertakings. Be it so. The Scheme has deliberately omitted any transfer of the local authorities' rights in this respect, and the Act contains no such power. All the Act does is to enable the Commissioners to make the transfer in the Scheme, if so minded, and that they did not do.

Shortly, none of the suggested implied powers will justify the present Bill.

The authorities are quite plain on this point. In *Attorney-General* v. *Andrews* (1) the Commissioners under a local Act of Parliament, the object of which was to supply Southampton with water, were empowered to raise funds by assessment, to be applied in certain specified ways having immediate reference to the purposes of the Act, "and in otherwise carrying the Act into execution." It was held that, although the Commissioners might have properly applied the funds raised in resisting a proceeding in Parliament prejudicial to the object of the Act; yet they were not justified in applying them to defray the expense of obtaining another Act of Parliament giving more extensive powers for carrying out the object of the existing Act.

That case is exactly in point. Lord Langdale M.R., then Lord Commissioner, said (2): "Now what the Commissioners want to do is more than the Act contemplates, or in any way empowers; and they want to do it by means of funds raised by the assessment which, under this Act, they have power

(1) 2 Mac. & G. 225. (2) 2 Mac. & G. 228.

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to make. . . . . The powers . . . . are given to them for certain specific purposes, and they have not the least reference to any application . . . . to Parliament." In the present case there is a direct reference to an application to Parliament, but only for a limited purpose. Rolfe B., the other Lord Commissioner, said (1): "The Commissioners find that the supply is not large enough, and therefore wish to have another Act containing more extensive powers. This cannot be said to be a carrying of the existing Act into execution, nor to be within the scope and spirit of that which was the object of the Legislature in passing the Act."

Every word of that judgment applies to the present case, as the Bill is not really "for the purposes of this Scheme."

In *Attorney-General* v. *Eastlake* (2), a similar case, Wood V.-C. said: "The next question then is, whether the fund is now proposed to be diverted from the purposes sanctioned by the Act."—This was the case of a body created under an Act of Parliament—"That is also concluded by authority. Any distinction to be drawn between *Attorney-General* v. *Andrews* (3) and this case would be too fine; . . . . However, it is now settled by authority, and it is quite impossible for me to entertain judicially any other opinion than that . . . . expressed by the other decisions, that you must look to the clauses in the Act, and that you cannot go out of those distinct and express clauses upon any notion that the trustees are justified in applying their money in a way beyond the express and literal terms of such clauses."

In *Attorney-General* v. *West Hartlepool Improvement Commissioners* (4), a similar case under a local improvement Act, Commissioners were incorporated and a district defined. The Commissioners were empowered to cause to be paved, drained and otherwise improved the town and township comprised in the district and to "do all acts matters and things for promoting the health comfort and convenience of the inhabitants" of the district, which they might deem or consider necessary, and "for that purpose" to "exercise all

(1) 2 Mac. & G. 230.
(2) 11 Hare, 205, 223, 224.
(3) 2 Mac. & G. 225.
(4) L. R. 10 Eq. 152.

the powers vested in them " by the Act. The Court granted an injunction to restrain the Commissioners from applying any moneys produced by rates towards the promotion of a Bill for an extension of their district.

In that case the words were very wide as to the expenditure of money. The Act provided that the money authorized to be raised might be applied first in payment of " the costs, charges, and expenses of or incident to the obtaining and passing " of the Act in question; secondly, in paying the interest; thirdly, in setting apart a sinking fund; and fourthly, " in carrying the several purposes of the Act into execution." It was contended that this was exactly what the Commissioners were doing. But the Court said " No! They are bound by the provisions of their Act."

The form of Order which the relators ask for was settled by Buckley J. in *Attorney-General* v. *West Riding Rivers Board* (1), a very similar case, which I need not refer to in detail.

The defendants seek further to escape these authorities by dividing their funds into three—namely, first, their capital moneys; secondly, their supply revenue; and thirdly, moneys for administrative expenses obtained by levying upon their constituent bodies, including the relators. They admit that they cannot expend capital for this purpose. They also admit that there is an express limitation as to their supply funds which have not yet come into existence, but they say that there is no express limitation with regard to the expenditure of their administrative fund. That again is not accurate. I have already read the 1919 Act, s. 28, sub-s. 1, providing that the defendants shall establish one fund to and out of which all receipts and payments shall be carried and paid, and clause 39 of the Scheme provides that: " The Joint Authority shall at the beginning of each financial year prepare an estimate of their receipts and expenses during the year and submit such estimate for approval to the Commissioners. The estimate shall be prepared in such a manner as to show the receipts and expenses in respect of

(1) 3 L. G. R. 764, 770.

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the supply of electricity by the Joint Authority and the administrative expenses of the Joint Authority."

Clause 37 of the Scheme provides that, "save as hereinbefore provided all moneys received by the Joint Authority in respect of their undertaking"—that applies both to the supply and the administrative fund—"shall be applied by them in manner and in the order following, that is to say:" Then four express provisions are laid down, and the fourth is: "In payment of all other expenses of carrying out the powers and duties of the Joint Authority under the Electricity (Supply) Acts 1882 to 1922, or this Scheme, not being expenses properly chargeable to capital."

The defendants contend that that clause only deals with supply moneys, and admit that qua supply moneys it contains a limitation which would prevent the application of those moneys for the purpose of this present Bill. That is inaccurate. The clause refers to all moneys received by this Authority and limits their application accordingly; and, as I have already pointed out, the 1919 Act, s. 28, sub-s. 1, says that the funds are to be regarded as one fund.

The next point taken is that under the 1922 Act, s. 5, sub-s. 4, there is this implied right which I have already mentioned to deal with the administrative fund, provided that it is applied for the improvement of organization referred to in that section. The improvement of organization referred to is in my opinion a mere definition of the body which the section is talking about. The section itself gives no power of any sort or kind to deal with the administrative fund. All that it does is to give a power to levy on the constituent members of the Authority the funds required for administration. The defendants are therefore inaccurate in that suggestion.

I have already indicated the next point taken with regard to these funds. It is suggested that if there is any limitation on the administrative fund, that limitation can only be gathered from the Acts generally, and no limitation ought to be implied inconsistent with the general tenor of the Acts. The first answer to that is that there is a limitation. The

second answer is, that the general powers contained in this statute are, except where otherwise expressly provided for, to be exercised by the defendants in strict accordance only with the provisions of their Scheme.

That is generally the case with which I have to deal. I have heard many arguments on other points which I have not specially mentioned, but in substance it all comes to this. The defendants were duly incorporated under the 1919 Act for the purpose of carrying out and being governed by this Scheme, which has obtained the sanction required by the Act. That Scheme gives an express power to promote any Bill in Parliament "for the purposes of this Scheme." That is equivalent to saying, that it does not give power expressly or impliedly for promoting Bills not for the purposes of the Scheme. It is quite plain that this Bill is in no sense a Bill for the purposes of the Scheme. Its object is to obtain extensions and alterations of the Scheme solely for the purpose of enabling the defendants to put the provisions of the Scheme itself into better operation.

The attempt to show from expressions in the Act and the Scheme that there is some implied authority outside the express authority in clause 10, has entirely failed, and the result is that this case is governed by the authorities that I have mentioned.

The wording of the notice of motion is taken from the *West Riding* case. (1) It is in my opinion accurate, and I make an order in those terms.

Solicitors: *V. B. Bateson; Sharpe, Pritchard & Co.; Sydney Morse.*

(1) 3 L. G. R. 764, 770.

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In re CUMMING AND WEST.

Ex parte NEILSON AND CRAIG *v.* THE TRUSTEE.

[No. 1174 of 1927.]

Bankruptcy—Partnership—Insolvency of Partners—Ante-nuptial Settlement by one Partner—Assignment of Policy by Settlor to Trustees—Covenant to pay Premiums and keep on foot Policy—Bankruptcy of Settlor—Proof of Debt by Trustees of Settlement—Rejection by Trustee in Bankruptcy—Joint and separate Debts of Partners—Postponement until all Creditors paid—Partnership Debts—Priority of Claims—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 33, *sub-s.* 6; 36, *sub-s.* 2; 42, *sub-s.* 2; 63, *sub-s.* 1.

A. and B. were traders in partnership. In 1927 both partners were adjudicated bankrupt. In 1910, A. on his marriage had executed an ante-nuptial settlement, by which he (inter alia) covenanted with the trustees of the settlement to keep up a life policy on his life then existing and to pay the premiums, etc. On the bankruptcy of the two partners, the trustees of the settlement lodged a proof in the bankruptcy of A. with regard to the covenant to keep up the policy, for a sum that was arrived at by commuting in a single payment the annual premiums payable to keep up the policy and to make it fully paid. The trustee in bankruptcy rejected the proof on the ground that under the Bankruptcy Act, 1914, s. 42, sub-s. 2, their claim was postponed until all the other creditors for valuable consideration in money or money's worth had been satisfied, and he alleged that the assets available would not be sufficient:—

Held, that the covenant fell within s. 42, sub-s. 2, and that the trustee was right in rejecting the proof, as being a claim for something which was only provable after the other creditors for valuable consideration in money or money's worth had been satisfied; and also that, having regard to the language of ss. 33, sub-s. 6; 42, sub-s. 2; and 63, sub-s. 1, of the Bankruptcy Act, 1914, the right of the trustees to put in a proof, must depend on all the creditors of the partnership between A. and B., the joint creditors of the partnership, as well as the separate creditors of A., being first satisfied.

BANKRUPTCY MOTION.

John Barr Cumming and Milward West were in partnership trading as Messrs. Cumming & Kelley. On October 28, 1927, a receiving order was made against the estates of the said J. B. Cumming and M. West, and they were both duly adjudged bankrupt. It subsequently transpired that the separate estates of both bankrupts showed a substantial surplus available for the trade creditors, so that the private creditors could be

paid in full. One John Adamson was appointed trustee in bankruptcy of both the bankrupt partners.

In the year 1910 one of the partners, J. B. Cumming, had, prior to his marriage, executed an ante-nuptial settlement. By such settlement, which was dated July 25, 1910, and made between J. B. Cumming of the first part, Gladys L. N. Cumming (then Gladys L. N. Hubbard) of the second part, and Alexander Neilson and W. B. Craig, trustees of the settlement (hereinafter called " the trustees "), of the third part, J. B. Cumming as settlor thereby assigned to the trustees a certain policy of assurance on his life dated January 26, 1910, for 1000*l.* in the Sun Life Assurance Society, together with bonuses, at the annual premium of 24*l.* 11*s.* 8*d.*, to be held by the trustees upon the trusts of the settlement therein declared. He further covenanted to find an additional sum of 1000*l.* and bring it into settlement in order to create a trust fund of 2000*l.*, such trust fund to be held by the trustees upon the trusts mentioned in the settlement.

In the settlement was contained a covenant by the said J. B. Cumming (therein called " the husband ") in the following terms : " 6. The husband hereby covenants with the trustees as follows—: (1.) [If the marriage shall be solemnised] he will not do or suffer anything whereby the policy hereby assigned . . . . may become void or voidable." " (2.) He will pay the annual premiums or other money (if any) and will do all things necessary for keeping on foot the said policy hereby assigned . . . . or for restoring the same respectively if the same respectively shall have become voidable." " (3.) If in any case the policy hereby assigned . . . . shall become void, he will as soon as may be and at the option of the trustees, either effect or enable them to effect with such life assurance company or society as the trustees shall direct, and in their names, a new policy or policies on the life of the husband which will secure to the trustees such a benefit or such benefits as . . . . in the opinion of the trustees will be as advantageous to their beneficiaries as the benefit or benefits which the void policy or policies would have secured, if it or they had continued in force. . . . ."

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"(4.) He will not do or suffer anything whereby the trustees may be prevented from recovering or receiving any of the money intended to be assured by the said policy hereby assigned or by any such future policy as aforesaid."

"7. Provided always as follows—: (2.) It shall not be obligatory on the trustees to enforce any of the covenants hereinbefore contained in relation to the said policy or policies, and no omission by the trustees to enforce any such covenant as last aforesaid shall be chargeable as a breach of trust, and neither the trustees nor any of them nor the executors or administrators of any trustees shall be answerable for any of the said policies becoming void through any means whatsoever."

J. B. Cumming never in fact found the 1000*l.* which by his marriage settlement he had covenanted to pay to the trustees, and consequent on the adjudication in bankruptcy, was unable to pay the premiums on the 1000*l.* policy of life assurance.

On July 10, 1928, Mr. Alexander Neilson, one of the trustees of the ante-nuptial settlement, on behalf of himself and his co-trustee lodged a proof in the bankruptcy of J. B. Cumming for 367*l.* 1*s.* against his separate estate in the following terms: "I Alexander Neilson . . . . say as follows (1.) That the said John Barr Cumming was at the date of the receiving order, viz. October 28, 1927, and still is justly and truly indebted to me and to W. B. Craig, my co-trustee, under the settlement referred to in the account endorsed hereon [the ante-nuptial settlement dated July 25, 1910] in the sum of 367*l.* 1*s.* as compensation for breach of covenant to pay premiums on a policy of insurance upon his life as shewn by the account endorsed hereon; for which sum or any part thereof I say that I have not nor hath the said W. B. Craig or any person by our order or to my knowledge or belief for our use had or received any manner of satisfaction or security whatsoever."

It was shown that the sum of 367*l.* 1*s.* was arrived at by commuting in a single payment the annual premiums payable on the policy of life insurance; which sum was by a letter

from the Sun Life Assurance Society dated June 6, 1928, stated to be the proper sum payable to make the policy fully paid. The proof was subsequently amended by increasing the sum of 367*l.* 1*s.* to 386*l.* 6*s.* 3*d.*, as another premium became payable in December, 1928.

By a letter dated November 6, 1928, J. Adamson, the trustee in bankruptcy, rejected the proof of the trustees of the settlement on the following grounds: "That by reason of the provisions of the Bankruptcy Act, 1914, s. 42, sub-s. 2, the said claim for dividend is postponed until all the other creditors for valuable consideration in money or money's worth have been satisfied, and the insufficiency of the assets will prevent the said creditors being so satisfied. . . . .

Signed, John Adamson, trustee.

To Alexander Neilson, Esq., K.C."

The trustees consequently applied to the Court by motion, for an order that the rejection by the trustee of their proof of debt against the separate estate of J. B. Cumming for the sum of 386*l.* 6*s.* 3*d.* might be reversed, varied or discharged; and for an order that the trustee be directed to admit the proof for the full amount thereof.

The first point for argument was whether the trustee had properly rejected the proof under s. 42, sub-s. 2, of the Bankruptcy Act, 1914. (1)

C. N. Tindale Davis for the settlement trustees. The trustee in bankruptcy was not justified in rejecting the proof. The question involves the construction of the Bankruptcy Act, 1914, s. 42, sub-s. 2. The word "executed" in the sub-section means "executed" by the settlement in this case. The covenant by the bankrupt is really in the nature of a covenant of indemnity to the settlement trustees.

[Counsel's argument is further indicated in the judgment of the learned judge.]

F. D. Morton for the trustee in bankruptcy. It is submitted the language of the sub-section is being unduly strained by the applicants. The question is one of priority, and the covenant is only void so far as the claim is postponed until

(1) See note (1) post, p. 539.

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all the other creditors have been satisfied. The trustees' claim is clearly one for the payment of money, and falls within the sub-section. The word "executed" in the sub-section means "executed" by the payment of money.

TOMLIN J. On July 25, 1910, an ante-nuptial settlement was executed on the marriage of one John Barr Cumming and Gladys Lucy N. Hubbard. By the settlement the husband assigned a policy of assurance on his own life for 1000*l.*, and agreed to pay a certain sum of 2000*l.* to the trustees. The trustees were to hold the trust fund from and after the marriage on trust to pay the income to the husband during his life, but subject to a trust to pay the premiums needed to keep in force any policy for the time subject to the settlement; then the wife took the second life interest, and there was an ultimate trust for the children of the marriage. There were also certain covenants by the husband with the trustees, first, that if the marriage should be solemnized he would not do or suffer anything whereby the policy assigned, or any policy or policies which might be effected as thereinafter provided, might become void or voidable; and secondly, that he would pay the annual premiums or other money (if any) and do all things necessary to keep on foot the policy assigned or any other policy or policies. By clause 6 (3.) it was provided that in case any policy or substituted policy should become void the husband would either at the option of the trustees effect, or enable them to effect, with an insurance company, substituted policies. Also, by clause 7 (2.) it was provided that it should not be obligatory on the trustees to enforce the husband's covenants in respect of the policy.

On October 28, 1927, a receiving order was made against the husband and adjudication followed in due course, and thereupon the trustees of the settlement put in a proof to this effect, that the bankrupt was at the date of the receiving order, and still was, justly and truly indebted to them, the trustees under the settlement, in the sum of 367*l.* 1*s.* (subsequently amended to 386*l.* 6*s.* 3*d.*) as compensation for breach of covenant to pay premiums on the policy of assurance upon

his life, as shown by the account endorsed thereon. The endorsement referred to the settlement of July 25, 1910, and stated that the plaintiffs claimed the amount required to make the policy fully paid; and reference was also made to a letter from the Sun Life Assurance Society dated June 6, 1928, indicating that a single payment at that time of 367*l.* 1*s.*, payable on or before June 30, would constitute the policy fully paid. The trustee in bankruptcy rejected the proof in these terms: "I have this day rejected your claim . . . . on the following ground—: That by reason of the provisions of s. 42, sub-s. 2, of the Bankruptcy Act, 1914, the said claim for dividend is postponed until all the other creditors for valuable consideration in money or money's worth have been satisfied, and the insufficiency of the assets will prevent the said creditors being so satisfied." Then there is a notice that if they are dissatisfied they can apply to the Court.

The trustees being dissatisfied, have applied to the Court, and the question which I have to determine is whether the trustee in bankruptcy has properly rejected the proof under s. 42, sub-s. 2, of the Bankruptcy Act, 1914. That sub-section provides as follows. (1) [His Lordship read the sub-section.]

The sub-section contains elements of obscurity, but there are certain features of it which I think are reasonably clear. It is said by Mr. Tindale Davis on behalf of the applicants,

(1) Bankruptcy Act, 1914, s. 42, sub-s. 2: "Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied."

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as I understand it, that the section ought to be read as though the words "wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent" were governed both by money and by property; and that in a case of this sort, where a settlor has assigned a policy and covenanted to pay the premiums, the covenant to pay the premium is only in the nature of a covenant of indemnity to the trustees ancillary to the transaction of assignment which has been executed, and is not, as I understand him, an independent transaction which falls within the words "any covenant . . . . which has not been executed at the date of the commencement of his bankruptcy." Further he argues that such a covenant is not a covenant for the future payment of the money in the sense in which it is used in the section, because a covenant for the future payment of money, as I understand him, means a covenant to transfer some specific sum of which it can be predicated at the date of the settlement that the settlor had or had not an interest therein. First, let me say how I read the section. I do not read the section as Mr. Tindale Davis reads it. It seems to me that the words "wherein the settlor had not at the date of the marriage any estate or interest" are words governed by the word "property." If the construction for which Mr. Tindale Davis contends were the true one, it seems to me that the language of the section should run in this way: "either for the future payment for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband, or children, of property." In fact it runs: "for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband, or children, of property." It is difficult to see how both "money" and "property" in that collocation of the words can constitute the antecedents of "wherein." That being so I think the problem is simply this: Is the covenant to pay the premiums a covenant for the future payment of money under a covenant which has not been executed? It is in my judgment clearly a covenant for the future payment

of money. I am unable to see how, where there is an assignment of a policy with a covenant to pay the premiums, it can be said that the covenant to pay the premiums ceases to be a covenant for the future payment of money within the language of the section, because in fact the covenant is taken for the protection of the property which has been assigned. That is no doubt a good reason for taking the covenant, but it does not seem to me to be a reason for altering the meaning of the words of this section. In my judgment the covenant falls within the language of the section, and the trustee was right in rejecting the proof upon the footing that he did—namely, that it is a claim for something which is only provable after the other creditors for valuable consideration in money or money's worth have been satisfied.

The question whether the claim of the trustees was only postponed to the separate debts of the bankrupt, or to the joint debts of the partnership as well as the separate debts of the bankrupt partner now came on for argument.

C. N. Tindale Davis for the trustees. The claim can only be postponed to the separate creditors of the bankrupt, and not to the joint debts of the partnership as well as the separate debts. The Bankruptcy Act, 1914, s. 33, sub-s. 6, must be looked at. (1) If carefully considered, it is submitted there is shown to be an inconsistency between that sub-section and s. 42, sub-s. 2. The latter can only be read as if the creditors there referred to were of the same class—namely, the separate creditors—and therefore this claim can only be postponed to them and not to the joint creditors as well: see Williams on Bankruptcy, 13th ed., pp. 189, 190. Further s. 63, sub-s. 1, of the Bankruptcy Act, 1914, is strongly relied on. (2) Again, these sections, it is submitted, show inconsistency to one another.

Sect. 42, sub-s. 2, is not really a section apt in its terms for a joint bankruptcy, such as a partnership, but only for a sole trader. (3)

(1) See note (2) post, p. 543. (2) See note (1) post, p. 545.
(3) See note (1) ante, p. 539.

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As regards a wife's claim against her husband's estate, see s. 36, sub-s. 2, of the Act of 1914. (1) There occur again the words "all claims of the other creditors": Williams on Bankruptcy, p. 209. And see *In re Tuff* (2), a case decided under the corresponding section—namely, s. 3 of the Married Women's Property Act, 1882—to s. 36, sub-s. 2, of the Bankruptcy Act, 1914. The view of Cave J. on p. 91 on almost identical words in another Act is relied on. Both s. 33 and s. 42 really only apply to a sole trader. It is suggested "claim" is the same as "proof"; the statutory form of proof is to be found at p. 632 in Williams on Bankruptcy, Form 60.

F. D. Morton contra. The claim is postponed to all creditors. *In re Tuff* (2) has no bearing on the point, the claims of other creditors were not considered in that case.

The words "other creditors" in s. 42, sub-s. 2, mean "the other creditors in the bankruptcy." In *Ex parte Taylor* (3) the claims of "other creditors" was considered. Even though that case was decided under another Act—namely, Bovill's Act—it is submitted it can be applied to a very similar point arising under another statute; and there is no authority against it: see Cotton L.J. at p. 377. There is really no authority on this point for the assistance of the Court.

Tindale Davis in reply. *Ex parte Taylor* (3) cannot help the contention of the trustee in bankruptcy, though of course a creditor can put in a further claim—after rejection—when all the separate creditors have been paid.

TOMLIN J. The second point in this case raises a question of some interest. A receiving order was made against a partnership firm of two persons, and in due course adjudication followed; that is to say, adjudication of each of the partners. In the administration in bankruptcy of their estates, it is found that, in regard to one of the partners, Mr. J. B. Cumming, the separate estate, after providing for the separate creditors, other than the creditors whose claims

(1) See note (1) post, p. 546. (2) (1887) 19 Q. B. D. 88.
(3) (1879) 12 Ch. D. 366.

are in question, shows a substantial surplus, whereas upon the joint estate, after payment of the joint creditors, there is a deficiency. Assuming that there were no claims in respect of the separate estate covered by the Bankruptcy Act, 1914, s. 42, sub-s. 2—to which I will refer in a moment—in the ordinary course the deficiency on the joint debts would be satisfied, in part at any rate, out of the surplus on the separate estate. Sect. 42, sub-s. 2, is a section which postpones certain classes of claims. (1) There being a claim within the sub-section, the contest now is whether that claim is postponed to all the debts, separate and joint, or whether it is postponed only to the separate debts.

The difference to the claimants is material, because if it be postponed only to the separate debts, they will be paid; whereas if it be postponed to the separate and joint debts, by the time the joint creditors have had what they are entitled to out of the surplus of the separate estate, there will be little or nothing left for the claimants.

The Bankruptcy Act, 1914, provides by s. 33, sub-s. 6, how the estates of partners, where there is an adjudication against all the partners in the firm, are to be dealt with. The sub-section is in these terms. (2) [His Lordship read the sub-section:] That is a clear provision as to the manner in which the administration of those two estates, the separate estates of the partners and the joint estate of the firm, is to be dealt with. Sect. 42 provides, by sub-s. 2, as follows: "Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of

(1) See note (1) ante, p. 539.

(2) Bankruptcy Act, 1914, s. 33, sub-s. 6: "In the case of partners, the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance to payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estatee"

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property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy "—up to that point that is only describing the class of claimant to which this sub-section applies, and what follows is an indication of the consequences—" be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied." On that the question arises, where there is a joint adjudication, whether the claim for dividend which is saved out of the voidness is something that is postponed only to the claims of separate creditors, or whether it is postponed to the claims of all creditors.

It is said that if you read literally the words " all claims of the other creditors," so that the postponement is a postponement to both separate creditors and joint creditors, you find a provision which is inconsistent with s. 33, sub-s. 6, which I have already read (1), because it is said that there there is a plain direction in terms that the separate estate is to be applied to the payment of all the separate debts before any of it goes to the joint creditors; and the joint estate is to be applied in payment of the joint debts before any goes to the separate creditors. If in fact you postpone under s. 42, sub-s. 2, this particular claim to both separate and joint creditors, you are in fact applying the separate estate in a manner which is contrary to the provisions of s. 33, sub-s. 6. Therefore, it is said that in order to produce consistency, it is necessary to read s. 42, sub-s. 2, with a limitation of this nature—namely, that the postponement is until " all claims of the other creditors " of the same class have

(1) See note (2) ante, p. 543.

been satisfied; and that if you do that, you then have a consistent whole. On the other hand, it is said: "No, you must adhere to the primary and natural meaning of the words"—it is "all claims of the other creditors"—and there is no justification for cutting the words down, but you must read this sub-section as in the nature of a proviso upon s. 33.

Before expressing a view as to the merits of those two alternative constructions, I desire to call attention to another section of the Act of 1914 which may be said to have some possible bearing upon the question. Sect. 63, sub-s. 1, of the Act provides. (1) [His Lordship read the sub-section.] It is said that where, instead of joint adjudication, you have one member of the firm only adjudged bankrupt, and in his case there is a claim which is postponed under s. 42, this section, if read literally, provides that the joint creditors shall not be paid until all the separate creditors have received the full amount of their respective debts; and "all the separate creditors"—unless you are going to limit those words—must mean including those separate creditors who, under s. 42, sub-s. 2, are postponed in the terms of that section. The result is that if you read in s. 42, sub-s. 2, "all other creditors" as meaning joint as well as separate, you produce, where there is a joint adjudication, a result different from the result that follows under s. 63, sub-s. 1, where there is an adjudication of one partner only. That again is urged as a reason why I should make an effort to introduce a measure of consistency through all these sections by reading s. 42, sub-s. 2, as a section in which the creditors to whom the claimant is postponed are creditors of the particular category —namely, separate creditors.

One other section has been referred to, and that is s. 36, sub-s. 2, which deals with the postponement of husbands'

(1) Bankruptcy Act, 1914, s. 63, sub-s. 1: "Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts."

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and wives' claims, and which is a reproduction of a section originally appearing in the Married Women's Property Act, 1882. That provides as follows. (1) [His Lordship read the sub-section.] There again we get the phrase "all claims of the other creditors"—quite a general phrase.

In regard to that section, or the earlier appearance of it in the Married Women's Property Act, where it is substantially in the same words, my attention has been called by Mr. Tindale Davis to the case of *In re Tuff.* (2) There it was held that, where a wife lends her money to a trading partnership of which her husband is a member, she is, notwithstanding the section, entitled to prove, on the bankruptcy of the partnership, against the joint estate in competition with other creditors. That case was determined by Cave J. and, as I read his judgment, what he held was that the section did not in terms apply to a loan by the wife to her husband and another when they are carrying on business together. In other words, he said that the section was one which related to a loan by a wife to a husband exclusively, and not to the case of a loan by the wife to a husband and somebody else jointly, and taking that view of the section, he said that it did not apply. At the end of his judgment he put it in this way: "It seems to me s. 3 is so drawn as to apply only where the husband is the sole trader; and that, where he is trading in partnership with somebody else, the question which I shall have to ask myself in each case will be, whether there was really a loan to the husband in order that he might do what he pleased with it, contributing it to the firm or not as he thought proper, or whether it was a loan by the wife to the firm." I understand he means by that that the section only applies to a loan to the husband. If

(1) Bankruptcy Act, 1914, s. 36, sub-s. 2: "Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied."

(2) 19 Q. B. D. 88, 91.

there is a loan to the husband, and the husband in fact is a member of a partnership, but is carrying on business on his own account as well, in order that it may be ascertained whether the section applies, there will arise the question of fact whether the money was lent to the husband, or whether it was lent to the partnership. But it does not appear to me that that case is directed in any way to determine what is the meaning of the words "all claims of the other creditors." Therefore, so far as s. 36, sub-s. 1, and *In re Tuff* (1) are concerned, I get, from that decision, no light on the matters which I have to solve.

In construing an Act of this kind, it is the anxious desire of the Court to arrive at a conclusion which will not produce an inconsistency, if the language employed admits of that result. If I were driven to select one or other of the constructions which have been offered to me with a view to arriving at consistency, it may be that it would be my duty to select that which will produce the nearest approach to consistency. But I doubt whether this problem of inconsistency really arises upon the Act. It is to be remembered that s. 42, sub-s. 2, is framed in a special way. It provides that the contract or covenant shall be void against the trustee in bankruptcy except so far as it enables the persons entitled under the covenant to claim for dividend in the settlor's bankruptcy under or in respect of the covenant. That is curious language. Presumably the curious or unusual framework of the clause is due to the desire of the legislature to produce a special result. The contract is void against the trustee, but there is reserved out of the voidness, a right on the part of the persons entitled under that contract to claim for dividend. It has been quite fairly and properly admitted by Mr. Tindale Davis that, having regard to the decision in *Ex parte Taylor* (2), the trustee in bankruptcy is entitled, on a claim made within s. 42, sub-s. 2, to reject the proof, leaving, of course, the claimant free, when all those creditors to whom he is postponed have been satisfied, to return to the charge, if he finds that the circumstances

(1) 19 Q. B. D. 88. (2) 12 Ch. D. 366.

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of the case are such that he can thereby obtain some advantage.

The real explanation of these sections, and the explanation which seems to me to make them consistent throughout, is that "creditors" there means the persons entitled to prove; and that when there is a reference to "separate creditors," it means separate creditors, that is to say, persons whose claims are not made void by s. 42, but persons whose proofs the trustee is entitled to accept: and in the same way "joint creditors" means those creditors whose proofs the trustee is bound to accept; and that persons who claim under a contract made void against the trustee, are not creditors. They are persons having a special right—namely, a right to a claim for dividend in the settlor's bankruptcy, under or in respect of the contract, after all the claims of the other creditors for valuable consideration have been satisfied. If, as I think, that is the true meaning of these sections, the result is that the claimants in this case do not stand to-day as creditors; and their right to put in a proof, or their right to insist on the acceptance of that proof by the trustee, must depend upon all the creditors, that is to say, all the separate and joint creditors, whose proofs the trustee is bound to accept, having been first satisfied.

Therefore, I think that Mr. Tindale Davis's claim fails, and that this application, he having failed on the first point also, must be dismissed.

Solicitors: *May, Woulfe & Gwyther; Constant & Constant.*

A. R. T.

BERNHARDT *v.* GALSWORTHY.

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Feb. 14.

[1869. B. 349.]

Law of Property—Transitional Provisions—Administration Action pending—Statutory Trusts for Sale—Right to exercise without Leave of the Court—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV.*

In an administration action in which a decree had been made, and which was still pending, a receiver had been appointed, who was receiving the rents and profits and distributing them amongst various persons. On the coming into force of the Law of Property Act, 1925, the statutory trusts under Part IV. of Sch. I. of the Act came into operation, and the trustee, in whom the legal estate was vested, became invested with the statutory trusts for sale :—

Held, that the trustee could exercise the statutory trusts without the sanction of the Court in the still pending suit.

Cardigan v. *Curzon-Howe* (1885) 30 Ch. D. 531 followed.

In this suit, instituted in 1869, in which a decree was made on January 14, 1870, and which was still pending, a receiver had been appointed, who was receiving the rents and profits, and distributing them amongst some thirty-six persons, and this distribution must continue until the death of the survivor of two persons, both far advanced in life. The legal estate was vested in the Public Trustee, who was appointed trustee of the will in 1915, and he was a defendant to the action. On the coming into force of the Law of Property Act, 1925, on January 1, 1926, the property being held in trust for several persons as tenants in common, the statutory trusts under Part IV. of Sch. I. of the Act came into operation, and the Public Trustee became invested with the statutory trusts for sale. Circumstances had arisen which rendered it necessary that those statutory trusts should be carried into effect in order that the estate should be relieved of certain property. The question now raised by the summons, which was taken out in the action by the Public Trustee, was whether he could exercise those powers without the sanction of the Court in the still pending suit.

A. L. Ellis for the Public Trustee. The question to be determined is whether the Public Trustee can exercise the

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statutory trusts without obtaining the leave of the Court. It is submitted that the statutory trust for sale is paramount to the will and to the administration action, and that consequently the proceeds of sale and not the real estate are the subject-matter of the action. *Cardigan* v. *Curzon-Howe* (1) was a very similar case to this, and there it was held that the tenant for life could exercise his powers under the Settled Land Act, 1882, without coming to the Court. The only difficulty here is that there is a receiver, but in future he has only to receive the income of the proceeds of sale and the rents and profits until sale. Sect. 28 of the Law of Property Act, 1925, seems to bring this case within *Cardigan* v. *Curzon-Howe* (1): see also the judgment of Astbury J. in *In re Flint.* (2)

W. A. Peck for the plaintiff.

B. S. Tatham for other defendants.

EVE J. The point raised is in my opinion determined by the reasoning of Chitty J. in *Cardigan* v. *Curzon-Howe.* (1) In that case an action was pending, instituted by the tenant for life herself, wherein a decree had been made for the execution of the trusts of the settlement. The tenant for life after the passing of the Settled Land Act, 1882, as tenant for life under the Act contracted to sell part of the settled estate. The purchaser objected on the ground that she was endeavouring to ignore her own suit and could not effect a sale without the sanction of the Court in the administration action. Chitty J., after referring to all the relevant sections of the Act, came to the conclusion that the statutory power the tenant for life was purporting to exercise was a power paramount to the settlement, and he puts his conclusion in these words (3): "Now it appears to me, as I have said, that the result of the Act is to give an overriding power to the tenant for life. It precludes the settlor from any attempt to limit or destroy the power. It precludes the tenant for life himself by any contract from impairing the powers

(1) 30 Ch. D. 531. (2) [1927] 1 Ch. 570, 575, 578, 579.
(3) 30 Ch. D. 531, 538.

conferred on him, and it seems to me it would be a strange thing that upon an Act so framed, considering the powers which are thus strictly guarded and preserved to the tenant for life, that the effect of this suit, and a decree therein obtained before this Act came into operation, should impose any restraint upon the tenant for life in the exercise of his powers."

The statutory trusts, as was pointed out by Astbury J. in *In re Flint* (1), have displaced the trusts contained in the will, that is to say, they have superseded the trusts for the execution of which the decree was made, and can in my opinion be exercised without obtaining the leave or sanction of the Court in the administration action.

I therefore hold that it is competent for the statutory trustees to exercise their statutory powers without the leave of the Court, and although it may be that some application may have to be made after the exercise of the powers in regard to the position of the receiver, who from that time will be receiving the income of the proceeds, and not the rents and profits, this does not, so far as the execution of the trusts is concerned, call for any present application to the Court.

The order in *Cardigan* v. *Curzon-Howe* (2) can be adopted mutatis mutandis, with the addition of the words: "Notwithstanding a receiver has been appointed in the administration action" and a direction to the receiver "to deliver up possession of the premises to the purchaser on completion of the sale."

Solicitors: *Galsworthy & Bedwell; Hillearys.*

(1) [1927] 1 Ch. 570, 578. (2) 30 Ch. D. 531.

P. J. B.

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In re MICHELL.

THOMAS *v.* HOSKINS.

[1928. M. 678.]

Will—Two Codicils thereto—Duplicate Instruments with slight verbal Differences—Executed on same Date—Substitutional, not cumulative.

A testator executed a codicil to his will whereby he revoked the appointment of an executor and appointed another in his place, revoked a specific devise and bequest and declared certain other trusts of the property comprised therein, gave certain directions to his trustees, bequeathed pecuniary legacies additional to those in his will and declared that the power of appointing new trustees should be exercised by the surviving and continuing trustees, and in other respects confirmed his will.

On the same day he executed another codicil in almost identical terms, the only material difference being that a blank left in the amount of a legacy in one codicil was filled in in the other. The two codicils were attested by the same witnesses and placed in one envelope, which was sent to a bank for custody. The testator at a later date executed another, which he described as a "third" codicil to his will, and referred therein to his will and codicils:—

Held, that the two codicils of even date were duplicates of one and the same instrument, and that the legacies thereby given were substitutional and not cumulative.

ORIGINATING SUMMONS.

By his will dated April 30, 1923, the testator, Edward Blair Michell, having appointed the plaintiff Thomas and two other persons executors and trustees thereof, and given certain directions to his trustees, bequeathed a number of specific and pecuniary legacies. After making specific devises of certain parcels of real estate, the testator directed that the ultimate residue of his real and personal estate should be converted into money at such times as his trustees should think fit and the proceeds be divided equally between two nieces and a nephew named in the will.

On October 24, 1923, the testator executed a codicil to his will, whereby he revoked the appointment of his nephew, G. A. Michell, to be executor and trustee and appointed Philip Bennett to be a trustee in his place. He also revoked any devise or bequest contained in his will to Edith, the widow of his late brother A. T. Michell, and bequeathed to her "a legacy of £ . . . .," the amount in this codicil being left blank. The testator then declared that the property given by his will to Edith Michell should be taken and enjoyed by two other persons named for their joint lives with remainder to augment the resources of the Michell Scholarship Fund created by the will at Wadham College, Oxford. The codicil also contained a direction to the trustees as to the employment of the plaintiff Thomas as solicitor, if necessary, and gave the following additional legacies: "to my brother W. G. Michell for a ring 25*l.*, to my nephew Hugh Hoskins (now of Brighton) 50*l.*, to the daughter of my friend Captain Awdry, 25*l.*, to the widow of my late friend Matthew Benjamin Cohen, 100*l.*" The testator then declared that the power of appointing new trustees should be exercised by the surviving or continuing trustees, who should make such appointments always without any undue delay, and in other respects he confirmed his said will.

On the same date the testator executed another codicil to his will, which was practically a duplicate of the other, there being only two or three insignificant verbal differences, such as the description of Hugh Hoskins, "now of Brighton," being omitted. The only material difference was the filling in of the blank in the legacy to the testator's sister-in-law Edith Michell with the sum of 25*l.*

Both codicils were witnessed by the same persons, the manager and a clerk of the Bruton, Somerset, branch of the Westminster Bank, where the testator had an account. The testator placed them in one envelope and handed it to the bank manager for custody.

On December 1, 1924, the testator executed another codicil, which he described as a "third" codicil, by which he made

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further specific and pecuniary bequests, "besides those mentioned in my will or codicils," but did not revoke, repeat, or otherwise affect the dispositions in the two previous codicils.

The testator died on November 18, 1926, and his will and three codicils were duly proved by his executors.

The plaintiffs issued the summons to determine several questions arising in the administration of the testator's estate, but the only one calling for any report was whether the legacies given by the first two codicils to the defendants H. St. J. Hoskins, Violet Awdry and Sophy Cohen, were legacies of the respective amounts mentioned in one of such codicils, or of double such amounts, and what legacy if any the defendant Edith Michell was entitled to.

A. H. Droop for the plaintiffs.

A. Guest Matthews for the legatees under the first two codicils. The codicils are two distinct codicils and the benefits given by them are cumulative, not substitutional. The testator treated them as two codicils by calling the later codicil of 1924 a "third" codicil. That assumes the two codicils were both valid. *Whyte* v. *Whyte* (1), where two similar codicils were held to be substitutional, was a very special case. This case comes within the general rule as stated in *Wilson* v. *O'Leary*. (2) It is a rule of construction that two similar legacies in different instruments are cumulative, unless there is evidence of duplication in the instruments themselves. In *Coote* v. *Boyd* (3) parol evidence of intention which would now be inadmissible was allowed to be given. In *Campbell* v. *Earl of Radnor* (4) evidence of intention decided the case: Jarman on Wills, vol. ii., p. 1125.

Wilfred Hunt for the executor of the tenant for life. These two codicils contain various provisions which cannot operate more than once, such as revocations and directions to trustees. The inference is irresistible that one document is merely a

(1) (1873) L. R. 17 Eq. 50.
(2) (1872) L. R. 7 Ch. 448.
(3) (1785) 2 Bro. C. C. 521, 524.
(4) (1783) 1 Bro. C. C. 271.

substitute for the other. If the testator at the date when he executed the codicils did not intend duplication, the fact that he called his last codicil a "third" codicil does not affect the question. The decision in *Whyte* v. *Whyte* (1) has never been dissented from. In no case have two instruments of the same date been held to operate so as to give cumulative legacies. There is no provision that does not appear in both codicils.

C. D. Myles for the tenant for life of the residuary estate adopted the latter argument and referred to *Roxburgh* v. *Fuller.* (2)

H. B. Braund for a specific devisee.

EVE J. The testator made his will on April 30, 1923; some six months afterwards, on October 24, 1923, he signed two documents, both of which he describes as a codicil to the will. They were signed one after the other on the same date, and, having been signed, they were put away in an envelope with the testator's will and left in charge of the bank manager who, with the cashier, was the attesting witness to both these documents. The documents are practically in identical terms. Mr. Myles has been good enough to go through them and to point out the minute details, and they are only minute details, in which the one differs from the other.

The question I have to determine is whether these codicils are to be treated as copies one of the other, or as cumulative in their operation. In order to arrive at any determination on that point one must look at the whole of each document, it is not a case limited to the question whether or no the legacies in the two documents are substitutionary or cumulative, but it is a case where one has to inquire whether these documents were intended by the testator to act with cumulative force. It is obvious that so far as the great bulk of each document is concerned it could not have been intended to have any cumulative effect. What the testator did with

(1) L. R. 17 Eq. 50. (2) (1864) 13 W. R. 39.

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regard to revoking parts of his will, revoking legacies and giving directions as to the employment of legal assistance and matters of that sort was effectively done by one document and its repetition in the second document could have no further or cumulative effect; nor is this criticism limited to these matters; in each document a legacy of 25*l.* is bequeathed in identical language to his brother Walter Gordon for a ring. It cannot be that the testator contemplated the purchase by the legatee of two rings. The question resolves itself into the inquiry whether there is sufficient in these two documents to rebut the presumption that gifts by two testamentary documents to the same individual ought to be treated as accumulative and not substitutionary. In my opinion there is, and accordingly I hold the legatees are not entitled to cumulative legacies.

Solicitors: *Peacock & Goddard.*

H. L. L.

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[1926. G. 1342.]

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ROMER J.
July 10, 11, 31.
C. A.
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Dec. 17, 18.
1929
Feb. 13.

Charity—Will—Trust to found Society for the Preservation of Animals, Birds, or other Creatures, not human — Officials to be Anti-Vivisectionists— Validity.

Testatrix, who died in 1925, by clause 12 of her will gave her residuary estate to her trustees to form a trust for the founding, establishing and maintaining of a charitable institution to be called "The Beaumont Animals Benevolent Society" under such rules and regulations and under such committee of management not exceeding ten members and otherwise in all respects as her trustees should in their absolute discretion think fit, and having regard to her wish that the expense of management should be kept as low as possible; provided that all members of the committee and of the governing body and all officials of the said society should be and always have been declared anti-vivisectionists and opponents of all sport involving the pursuit or death of any stag, deer, fox, hare, rabbit, bird, fish, or any other animal, and to have for its objects (1.) the acquisition of land, if permitted by a judge of the Chancery Division or the Charity Commissioners, for the provision of refuges for the preservation of "all animals birds or other creatures not human"; (2.) the distribution of any part of the yearly income of the trust fund amongst such societies or homes for the benefit of animals generally or for the benefit of individual cases British or foreign as the committee of "The Beaumont Animals Benevolent Society" might think fit; (3.) the founding, establishing, endowing, supporting, maintaining or providing of hospitals or homes for animals in Great Britain having no declared vivisectionist upon the governing body or bodies thereof or in any way connected with the management thereof:—

Held, by Romer J., that, although it was possible to include within the scope of the trust animals which were harmful to the human race, the trust was a valid charitable trust; that the condition relating to the qualifications of the members of the committee and of the governing body and the officials of the society must be interpreted reasonably; and that, in that event, it was unlikely, having regard to the evidence, that there would be any difficulty in complying with the condition.

On appeal:—

Held, by the Court of Appeal (Lord Hanworth M.R. and Russell L.J.; Lawrence L.J. dissenting), reversing the decision of Romer J., that although a trust in perpetuity for animals might be a good charitable trust if in its execution there was necessarily involved a benefit to the community, yet where that element was wanting, the trust would be bad.

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Held, therefore, that trusts in the present case not having been shown to be for purposes beneficial to the community they were not good and valid charitable trusts.

In re Wedgwood [1915] 1 Ch. 113 distinguished.

ORIGINATING SUMMONS.

Mrs. Sarah Martha Grove-Grady, widow, by clause 12 of her will dated June 17, 1925, devised and bequeathed her residuary real and personal estate to her trustees upon trust to sell and convert and out of the moneys to arise from such sale and conversion to pay her funeral and testamentary expenses and debts and the legacies given by her will and to stand possessed of the residue of such moneys "Upon trust for the founding and establishing forthwith or as soon as may be after my decease if not already founded in my lifetime (without the acquisition of any interest in land which cannot lawfully be acquired and held for charitable purposes) and the thereafter upholding and maintaining of a charitable institution to be called 'The Beaumont Animals Benevolent Society' under such rules and regulations and under such committee of management not exceeding ten members and otherwise in all respects as my trustees shall in their absolute discretion think fit and having regard to my wish that the expenses of management shall be kept as low as possible Provided that all members of the committee and of the governing body and all officials of the said society shall be and always have been declared anti-vivisectionists and opponents of all sport involving the pursuit or death of any stag deer fox hare rabbit bird fish or any other animal and to have for its objects (1.) If the acquisition of land for that purpose shall be sanctioned by a judge of the Chancery Division of the High Court of Justice or the Charity Commissioners or other competent authority the purchase of such lands of any tenure whether being on the mainland or being an island or islands together with the buildings thereon situate in any part or parts of the United Kingdom of Great Britain and Ireland as the committee of 'The Beaumont Animals Benevolent Society' may in their unfettered discretion deem suitable and proper for the purpose

of providing a refuge or refuges for the preservation of all animals birds or other creatures not human which being ferae naturae may be living on such land at the time of the purchase thereof or which being ferae naturae or otherwise may be brought to and placed on such land or some part thereof by or with the consent of the committee of 'The Beaumont Animals Benevolent Society' and so that all such animals birds or other creatures not human shall there be safe from molestation or destruction by man And I declare that out of the trust fund provision shall be made by and at the discretion of the committee of 'The Beaumont Animals Benevolent Society' for the maintenance upkeep and preservation of such lands and buildings and the walls fences and hedges thereof including the employment of such custodians keepers or other persons as may seem necessary or proper And I declare that if the purchase of such lands as aforesaid shall by law require to be sanctioned by a judge of the Chancery Division of the High Court or the Charity Commissioners or other competent authority my trustees or the committee of 'The Beaumont Animals Benevolent Society' may take any steps which to them may seem expedient to obtain such sanction whether by means of a private Act of Parliament or otherwise to the acquisition of such land as aforesaid and may pay all expenses incidental thereto out of my residuary estate. (2.) The distribution of any part of the yearly income of the trust fund among such societies or homes for the benefit of animals generally or for the benefit of individual cases British or Foreign as the committee of 'The Beaumont Animals Benevolent Society' may think fit but without fettering their discretion it is my desire that all charitable subscriptions and donations being paid by me immediately prior to my death shall continue to be paid out of the yearly income of the trust fund so long as the said committee may think fit. (3.) The founding establishing endowing supporting maintaining or providing of hospitals or homes for animals in Great Britain having no declared vivisectionist upon the governing body or bodies thereof or in any way connected with the management thereof."

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The testatrix died on November 7, 1925, without leaving any issue.

The residuary estate was valued at about 200,000*l.*

This summons was taken out by the trustees of the will for the determination of the question (inter alia) whether the trusts declared by clause 12 of the will of and in relation to the residuary real and personal estate of the testatrix were good and valid charitable trusts.

Grant K.C. and *L. W. Byrne* for the trustees of the will.

Wilfrid Greene K.C. and *Norman Daynes* for the next of kin of the testatrix. This gift is a bad gift and not charitable. The formation of the society is a condition precedent to the coming into operation of the gift. It is an absolute condition. If the society could not be established the gift would fail. The testatrix has not indicated any intention that the fund should come into existence without the condition being attached to it. An institution is to be formed and persons have to be found who have always been declared opponents of all sport. The condition is too loosely and too vaguely expressed: see *In re Wilson* (1); and *In re Monk.* (2) The fact that the trust is a trust for the preservation of animals does not make it a charity. The question is whether the trust is beneficial. A trust to preserve pests is not charitable. Every penny of this money could be spent by the trustees in supporting a society for the preservation of rabbits in Australia: see *Bowman* v. *Secular Society, Ld.* (3); *In re Hummeltenberg.* (4) The Court must be satisfied that the gift is beneficial to the community. The trustees cannot lawfully apply the funds for purposes which do not fall within the description of being beneficial for the community: *Hunter* v. *Attorney-General* (5); *University of London* v. *Yarrow* (6); *In re Douglas.* (7) This gift is prima facie void for perpetuity. To avoid this position the gift must be shown to be charitable and beneficial to the community:

(1) [1913] 1 Ch. 314.
(2) [1927] 2 Ch. 197, 207.
(3) [1917] A. C. 406, 441.
(4) [1923] 1 Ch. 237, 242.
(5) [1899] A. C. 309.
(6) (1857) 1 De G. & J. 72.
(7) (1887) 35 Ch. D. 472.

see *In re Wedgwood* (1); see also Tudor on Charities, 4th ed., p. 60. If the Court is not satisfied that propaganda and expenditure for the suppression of vivisection are beneficial to the community they cannot be the subjects of a charitable trust: *In re Foveaux* (2); *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society.* (3)

The propositions against the validity of the gift may be summarized thus: (1.) A gift in favour of animals can only be a good charitable gift if it is for the benefit of the community. (2.) Such a gift can only be for the benefit of the community if it conduces to the moral, physical or intellectual well-being of the community. (3.) It follows that a gift for the benefit of animals, as such, is not necessarily charitable, since its object is the mere preservation of animals without any necessary element of benefit to the community or even to its detriment. (4.) In the present case no necessary element of benefit to the community is to be found in the gift, since it contemplates equally the preservation of useless or even harmful animals. (5.) Whether anything is prejudicial or beneficial to the community is a question of fact for the Court, and does not depend on the views of the testatrix. (6.) If the trust embraces both charitable and non-charitable objects, the whole gift is bad. (7.) Individual cases are included in the objects of the gift. Such an object is not a charitable purpose. (8.) Even if the gift is charitable, the directions as to the constitution of the society are so essential a part of the gift as to make the intention particular and not general, with the result that if those directions cannot be complied with the gift fails. (9.) The directions are so vague and uncertain that they cannot be complied with. (10.) If this is not correct, an inquiry should be directed to ascertain whether it is possible to comply with them.

Sir Boyd Merriman S.-G. and *Stafford Crossman* for the Attorney-General. The questions whether this is a charitable gift at all and whether its operation is prevented by the provisions relating to anti-vivisection are both absolutely

(1) [1915] 1 Ch. 113. (2) [1895] 2 Ch. 501.
(3) [1928] 1 K. B. 611, 622.

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covered by *In re Wedgwood.* (1) The bearing of the point as to anti-vivisection is very indirect. It does not constitute a trust. The testatrix merely wishes her directions to be carried out by a body of persons with an anti-vivisectionist mentality. *In re Foveaux* (2) was followed in *In re Verrall.* (3) *Armstrong* v. *Reeves* (4) was adopted and approved by Lord Cozens-Hardy M.R. in *In re Wedgwood.* (5) There is nothing in this trust for animals per se which prevents the object of the trust from being a perfectly good charitable purpose.

With regard to the construction of the will itself, the residue is given on trust for the benefit of animals; i.e., it is the intention of the testatrix that the money should be dealt with by people who would carry out that trust and the money is not intended for the next of kin. The clause means that the trust is to be carried out by people opposed to the pursuit of killing animals for purposes of sport, and does not involve fantastic questions relating, for example, to the pursuit of butterflies.

[They also referred to *In re Cranston.* (6)]

W. P. Donald and *J. Single* for other parties interested under the will.

Wilfrid Greene K.C. in reply.

Cur. adv. vult.

1928. July 31. ROMER J. The only question remaining to be decided upon the originating summons in this matter is whether the trusts declared by clause 12 of the will of the testatrix of and in relation to her residuary estate are good and valid charitable trusts. Those trusts are in these words: [His Lordship read the clause and continued:] There are several indications to be found in this clause that the predominating intention in the mind of the testatrix was the protection of the lower animals from cruelty and suffering. The fact that "refuges" are to be provided where the animals "shall be safe from molestation or destruction by man"—

(1) [1915] 1 Ch. 113.
(2) [1895] 2 Ch. 501.
(3) [1916] 1 Ch. 100.
(4) (1890) 25 L. R. Ir. 325, 338, 341.
(5) [1915] 1 Ch. 113, 118.
(6) [1898] 1 I. R. 431.

that hospitals or homes are to be provided for them—and the anxious desire of the testatrix to exclude from the control of the Beaumont Animals Benevolent Society all those who are not anti-vivisectionists and opponents of what are sometimes called blood sports, points strongly in this direction. Now, it has been established by authority that is binding upon me, and it is conceded by the heir at law and next of kin, that a gift the object of which is to prevent cruelty and suffering to the lower animals is charitable. That was established by the decision of the Court of Appeal in *In re Wedgwood*. (1) It is said, however, by the heir at law and next of kin, that whatever may have been the predominant intention of the testatrix, she has expressed the trust in such terms as to authorize the expenditure of her residuary estate by the society on any object that can be said to be for the benefit of the lower animals. But even if this be so, why should not the trust still be charitable? The reason why a gift for the protection of animals from cruelty is charitable is not because of the benefit that the lower animals derive from such a gift, but because of the benefits it confers upon the community. In *In re Wedgwood* (1), where the trust was for "the protection of animals" or for "the protection and benefit of animals" Lord Cozens-Hardy M.R. said: "Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty." He then cited a passage from the judgment of Holmes L.J. in the Irish case of *In re Cranston* (2), which was in these words: "Gifts the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable. . . . . If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation." Swinfen Eady L.J. said (3): "A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and

(1) [1915] 1 Ch. 113, 117, 122. (2) [1898] 1 I. R. 431, 457.
(3) [1915] 1 Ch. 113, 122.

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to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race." It is obvious that these observations are not confined in their application to cases where the expressed object of the gift is to prevent cruelty. As a matter of fact, the case in which the observations were made was one of a trust in which there was no express reference to cruelty at all. The observations, as I understand them, were concerned with the effect that the gift tends to have upon the community, and the question that I have to put to myself is this: Does a trust for the benefit of the lower animals tend to promote public morality? In my opinion that question must be answered in the affirmative. It has the very same tendency as Swinfen Eady L.J. said was possessed by a gift for the benefit and protection of animals. Its tendency is to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. It is, however, urged in opposition to this contention that whatever may be said in its favour with respect to a trust for animals beneficial to mankind, it ought not to prevail in the case of a trust that includes within its scope animals that are positively harmful to the human race; and this, it is said, is a trust of that kind. If it be a relevant consideration that under this trust the residuary estate may be employed for the purpose of protecting rats in England or rabbits in Australia, it might perhaps be suggested that the human race is quite as likely to obtain moral elevation by acquiring habits of kindness towards its enemies as by acquiring those habits towards its friends. But the same objection was put forward, and unsuccessfully, in *In re Wedgwood.* (1) It was disposed of by Kennedy L.J. in a passage that is equally applicable to the present case. He said (2): "It was contended in the argument addressed to us against the validity of this particular

(1) [1915] 1 Ch. 113. (2) [1915] 1 Ch. 121.

bequest as a charitable gift that it fails on account of such vagueness and generality of expression as would justify its application by the trustee to the protection and maintenance of noxious animals, and counsel instanced, if I remember rightly, lions and tigers. Now it is quite true, as laid down by Lindley L.J. in *In re Macduff* (1), that when we are dealing with general words we must consider whether there is such an indication of purpose or of trust that the Court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. But, at the same time, I can entertain no doubt that if the Court should now be asked to say whether the trustee under this bequest for the protection and benefit of animals was fulfilling his duty in expending the fund upon the preservation of beasts of prey or mad dogs the Court would not find any difficulty as to the answer which is dictated by reason and common sense. There are, I suppose, very few, if any, charities of a wide character, such as, to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination." The next objection on the part of the heir at law and next of kin to the validity of the trust is that it includes a trust for the benefit of individual animals. It is founded upon the second object for which the "Beaumont Animals Benevolent Society" is to be established—namely, "the distribution of any part of the yearly income of the trust fund amongst such societies or homes for the benefit of animals generally or for the benefit of individual cases British or foreign as the committee may think fit." In *In re Dean* (2) it was said by North J. that a trust for the benefit of the horses and dogs of the testator was obviously not a charity, because it was intended for the benefit of the particular animals mentioned and not for the benefit of animals generally, but in my opinion the phrase "individual cases" in the will of the testatrix refers to particular species of animals and not to any individual animal. For the objects of the gift are societies or homes, and it would be fantastic to suppose that the testatrix had

(1) [1896] 2 Ch. 451, 463. (2) (1889) 41 Ch. D. 552.

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in mind or contemplated the possibility of a society or home for the benefit of one or more individual animals. She was thinking of such societies or homes as exist for the benefit of (say) dogs or horses generally. Such societies or homes are without question charitable.

For these reasons, I am of opinion that the trusts declared of the residuary estate are charitable. It remains, however, to consider the effect of the conditions imposed by the testatrix as to the constitution of the committee or governing body and staff of the "Beaumont Animals Benevolent Society." It was not contended before me, though I understand that the point may be raised in a higher Court, that the condition invalidates the trust in so far as it may be considered as establishing a trust to promote the views of anti-vivisectionists. So far as this Court is concerned it is agreed that I must treat such a trust as charitable having regard to the decision of Chitty J. in *In re Foveaux* (1), which was treated as an authority for that view by the present Master of the Rolls in the *Yorkshire Agricultural Society's Case*. (2) It was, however, contended before me that the condition is so essential a part of the gift as to make the intention of the testatrix with regard to her residuary estate a particular and not a general charitable intention, that the condition cannot be complied with, and that the gift of residue accordingly fails. But even conceding that the condition is of the character alleged, why cannot it be complied with? It is said that no one can truthfully assert that he has always been a declared anti-vivisectionist and opponent of all sports involving the pursuit or death of any animal. This is true without any question if the investigation into the views of the candidates for service on the committee, governing body, and staff is to be carried back to the cradle. But the condition is to be interpreted reasonably, and if so interpreted the investigation need not go back beyond the time when the candidate attained to years of discretion. If the investigation be confined in this way, I cannot think that there will be any difficulty at all in complying

(1) [1895] 2 Ch. 501. (2) [1928] 1 K. B. 611, 622.

with the condition. Mr. Stephen Coleridge in his affidavit states that he and all the subordinate officials of the Anti-Vivisection Society fulfil all the qualifications referred to, and that such qualifications are also possessed by many reputable, responsible and trustworthy persons whom he can name. In saying this, Mr. Coleridge was no doubt putting upon the condition that construction which I have already held that it must bear.

In my opinion the trusts declared of the residuary estate are valid.

J. L. D.

C. A. The heir at law and the next of kin appealed. The appeal was heard on December 17 and 18, 1928.

Wilfrid Greene K.C. and *Norman Daynes* for the appellants.

Sir Boyd Merriman S.-G. and *Stafford Crossman* for the Attorney-General.

Grant K.C. and *L. W. Byrne* for the trustees of the will.

The arguments used in the Court below were substantially repeated. In addition to the cases cited in the Court below the following cases were referred to: *Chamberlayne* v. *Brockett* (1); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); *Attorney-General* v. *National Provincial Bank* (3); *Verge* v. *Somerville* (4); *In re Macduff* (5); *Jeffries* v. *Alexander* (6); *In re Joy.* (7)

Cur. adv. vult.

1929. Feb. 13. The following written judgments were delivered:—

LORD HANWORTH M.R. The will of the testatrix is dated June 17, 1925, and she died on November 7, 1925, a widow without children. The question to be decided is whether the disposition of the residue under clause 12 of the will is valid as a charitable gift, or offends against the rule against perpetuities. Upon an originating summons taken out to have this question determined, Romer J. held that a good

(1) (1872) L. R. 8 Ch. 206, 211.
(2) [1891] A. C. 531.
(3) [1924] A. C. 262, 265.
(4) [1924] A. C. 496, 501.
(5) [1896] 2 Ch. 451.
(6) (1860) 8 H. L. C. 594, 648.
(7) (1888) 60 L. T. 175.

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charitable trust was established. From that decision Mr. Arthur Wilson, who is the heir at law of the testatrix, and also one of her next of kin, and Mr. Charles Richardson, who was added by order dated January 28, 1928, as one of the next of kin, appeal. The amount of the residue in question is round about a sum of 200,000*l*.

It is not necessary to set out the full terms of clause 12, but some preliminary consideration of it is necessary.

It provides for the creation of a trust fund, upon trust for the establishment and maintenance of a charitable institution to be called "The Beaumont Animals Benevolent Society." A committee and governing body are to be created in the manner prescribed. The society is to have three objects, which are declared in three sub-paragraphs, and may be summarized as follows: (1.) The first is the establishment of a refuge "for the preservation of all animals, birds, or other creatures, not human, which being ferae naturae may be living on such land at the time of the purchase thereof, or which being ferae naturae, or otherwise, may be brought to, and placed on, such land or some part thereof, by, or with, the consent of the committee, and so that all such animals, birds or other creatures, not human, shall there be safe from molestation or destruction by man." Provision is made for the upkeep and preservation of such lands, etc., and for the employment of custodians, keepers or other persons as may seem necessary or proper. (2.) Secondly, for the distribution of the yearly income of the trust fund among such societies or homes for the benefit of animals generally, or for the benefit of individual cases, British or foreign, as the committee may think fit. (3.) Thirdly, for the founding establishing supporting and providing hospitals or homes for animals in Great Britain having no declared vivisectionist upon the governing body or in any way connected with the management thereof.

Upon the question of the construction of this clause I think that the objects of the Beaumont Animals Benevolent Society must be taken as a whole. They cannot be so separated that if (1.) were held bad, the other objects set

out in (2.) and (3.) might be held to be good, and so save the bequest.

Next, I cannot construe the opening words of sub-clause (1.) as to the acquisition of land as being a condition precedent to the whole clause. I agree with the argument that the words are to be read as "if and so far as may be necessary," and not as precedent to the operation of the clause.

With these points eliminated, it is clear that the question to be decided is that which Romer J. has determined—namely, does sub-clause (1.) provide for the establishment of a good charitable trust? I therefore turn to this sub-clause. It is to be noted that it provides for a refuge for animals which are to be free from molestation, or destruction, by man. There is no direct intimation that mankind or the community, or any part of it, are to derive any benefit from this establishment. Whatever good may accrue to the community, or any part of it, is indirect—indeed sub-conscious—for if the refuge were established upon an island, access to it might not be easy, and the number of visitors would probably be very small; indeed there is no provision for access to the refuge by visitors at all.

The speech of Lord Macnaghten in *Pemsel's Case* (1) is generally treated as the locus classicus for the classification of charities, and it is the last of the four classes there stated into which it is claimed that this bequest falls—namely, "trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The origin of this passage is traced by Lindley L.J. in *In re Macduff* (2) to the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham*. (3) Lindley L.J. lays stress upon the words. Sir Samuel Romilly used as to the fourth head which Lord Macnaghten did not repeat: "which is the most difficult" as showing that Sir Samuel Romilly appreciated, as also did Lord Macnaghten, that there might be some purposes of general public utility which might be charitable, and some which might not.

(1) [1891] A. C. 531, 583. (2) [1896] 2 Ch. 451, 467.
(3) (1805) 10 Ves. 522, 532.

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Now it has been held in many cases that charities for animals—using that phrase in a broad sense—are good. Thus, in the *University of London* v. *Yarrow* (1) a bequest "for the establishment of a hospital in which animals, which are useful to mankind, should be properly treated and cured, and the nature of their diseases investigated, with a view to public advantage" was held good: see per Lord Cranworth. (2) So in *In re Douglas* (3) the Home for Lost Dogs is stated to be a charitable institution; likewise the protection of animals: see *Armstrong* v. *Reeves* (4); and societies for the suppression and abolition of vivisection are charities within the legal definition: see *In re Foveaux*. (5) In that case Chitty J. says (6): "On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily cruelty; into the question of what is cruelty the moral element largely enters," and he cites *Lewis* v. *Fermor* (7), a case in which it was decided that the spaying of sows, an operation practised in some districts, was not cruelty within the statute 12 & 13 Vict. c. 92, s. 2.

From these authorities it seems clear that if the object be to enhance the condition of animals that are useful to mankind, or to secure good treatment for animals, whether those animals are useful to mankind or not (see per the Vice-Chancellor in *Armstrong* v. *Reeves* (8), and see per Wood V.-C. in *Marsh* v. *Means* (9)), or to insure humane conduct towards, and treatment of, them whether in respect of a particular subjection of them to the use of mankind, as for food (*In re Cranston* (10)), or in what is called vivisection, such objects are to be deemed charitable.

Plainly, therefore, a very wide interpretation has been given to the term charity, where the objective is not only

(1) 1 De G. & J. 72.
(2) Ibid. 79.
(3) 35 Ch. D. 472, 487.
(4) 25 L. R. Ir. 325.
(5) [1895] 2 Ch. 501.
(6) [1895] 2 Ch. 507.
(7) (1887) 18 Q. B. D. 532.
(8) 25 L. R. Ir. 325, 341.
(9) (1857) 3 Jur. N. S. 790.
(10) [1898] 1 I. R. 431.

the condition of men, but also of animals; but it is not to be treated as inclusive of every purpose, which the whim or caprice of a testator may prescribe. The caution administered by Lord Campbell in *Jeffries* v. *Alexander* (1) stands good: "A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed in sæcula sæculorum when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law, to be strictly watched and regulated." Illustrations of this limitation or restriction are to be found in the cases. I will refer to *Attorney-General* v. *Whorwood* (2), before Lord Hardwicke, where it is stated that "the Court has refused carrying into execution a particular turn of mind, though it was not a superstitious or illegal, but an indifferent use; as to feed sparrows," to *Tatham* v. *Drummond* (3), in which Lord Westbury rejected a gift "towards the establishment . . . . of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered." And in *In re Wedgwood* (4) Kennedy L.J. expresses the opinion that if the intention was the protection and maintenance of noxious animals, or the preservation of beasts of prey or mad dogs, the Court would not find any difficulty as to the answer which is dictated by reason and common sense. Turning then again to the fourth category —in *Pemsel's Case* (5)—there are two questions that must be asked and answered: (1.) Is the trust for a purpose beneficial to the community? (2.) If it satisfies that first test, is it charitable? A trust for a philanthropic purpose would satisfy the first question but not the second: see

(1) 8 H. L. C. 594, 648.
(2) (1750) 1 Ves. Sen. 534, 536.
(3) (1864) 4 De G. J. & S. 484.
(4) [1915] 1 Ch. 113, 121.
(5) [1891] A. C. 531, 583.

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In re Macduff (1), for there may be philanthropic purposes which are not charitable. Lindley L.J. treats a philanthropic purpose as one which indicated good will to mankind in general, and such purposes may be outside the construction which the Court puts upon charities.

Who is to decide these questions ? I agree with Holmes L.J. that the answer does not depend upon the view entertained by any individual—" either by the judge who is to decide the question, or by the person who makes the gift " : *In re Cranston.* (2) The test is to be applied from evidence of the benefit to be derived by the public or a considerable section of it ; though a wide divergence of opinion may exist as to the expediency, or utility, of what is accepted generally as beneficial. The Court must decide whether benefit to the community is established. In my judgment Russell J., as he then was, correctly states the proposition : " The question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it " : *In re Hummeltenberg.* (3)

It is necessary, therefore, to consider the facts before us in the present case. Before doing so, I desire to follow and apply the rules which were adhered to in *In re Wedgwood* (4), a case which is binding upon this Court. The Master of the Rolls adopts what was said by FitzGibbon L.J. in *In re Cranston* (5) : " Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow-creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be ' charitable.' "

Kennedy L.J. also follows the reasoning and words of FitzGibbon L.J. as forming the standard applicable to that case ; and Swinfen Eady L.J. (6) takes as his canon : " A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty,

(1) [1896] 2 Ch. 451.
(2) [1898] 1 I. R. 431, 455.
(3) [1923] 1 Ch. 237, 242.
(4) [1915] 1 Ch. 113.
(5) [1898] 1 I. R. 431, 446.
(6) [1915] 1 Ch. 113, 122.

and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means, promote feelings of humanity and morality generally, repress brutality and thus elevate the human race."

It is important to remember what were the terms and expressions of the testatrix in relation to which those standards were laid down and applied. The secret trust was given to the trustee, after a discussion with the testatrix; and the trustee suggested that he might help forward the movement for the humane slaughtering of animals, and also the movement to provide municipal abattoirs where animals could be properly and decently slaughtered, and the testatrix agreed that those were the sort of purposes, among others, which she would like to have forwarded. She wished to leave him an absolutely free hand to use his judgment as cases arose where he thought he could be of use to animals.

This statement makes it clear that the testatrix accepted as a primary concern of the trustee the removal of cruelty to animals. Such an object must clearly be accepted as a charity within the decided cases. But does the present case bear any resemblance to *In re Wedgwood* (1)? In this proposed refuge all creatures are to find freedom and safety from molestation or destruction by man. Whatever animals, birds or other creatures, ferae naturae, may be living therein or obtain access thereto, are to find sanctuary. The fox and the rabbit, birds of all sorts with the stoat and the weasel and rats as neighbours, and hawks and crows as spectators, are to live and enjoy themselves after their kind. The struggle for existence is to be given free play—that weapon wherewith nature maintains its balance against over fertility: see Darwin's Origin of Species, ch. iii. It is not a sanctuary for any animals of a timid nature whose species is in danger of dying out: nor is it a sanctuary for birds which have almost entirely left our shores and may be attracted once more by a safe seclusion to nest and rear their young. No such purpose is indicated, nor indeed possible. The one characteristic of the

(1) [1915] 1 Ch. 113.

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refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harry one another.

Such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind. Lord Sterndale, in *In re Tetley* (1), gives expression to the difficulty he felt in finding what limitation is to be imposed in respect of gifts said to be for the benefit of animals, and I share his difficulty. It is, however, in my judgment, clear that a decision that an object such as the testatrix defines in the present case is charitable, would go beyond any case decided at present and pass outside such limitations as have been laid down.

For these reasons, the appeal will be allowed and a declaration made as follows: Discharge the order of Romer J. in so far as it declares that the trusts declared by clause 12 of the will are good and valid charitable trusts and in so far as it orders the settlement of a scheme; and in lieu thereof declare that upon the true construction of the said will the trusts declared by clause 12 thereof are not good or valid charitable trusts and accordingly fail. Liberty to apply for an inquiry as to the persons beneficially entitled, respectively, to any real or personal estate of the testatrix, as to which she died intestate.

As to the costs of the appeal, the order will be the same as in the Court below.

LAWRENCE L.J. In this case I have the misfortune to differ from the other members of the Court. In my opinion the conclusion reached by Romer J. was right and ought to be affirmed.

There is no doubt that the trusts declared by the will of the testatrix concerning her residuary estate contravene the rule against perpetuities and cannot be upheld unless they are charitable trusts in the technical sense.

The question whether any particular trust is charitable does not depend upon the view entertained by any individual,

(1) [1923] 1 Ch. 258, 266.

either by the judge who has to decide the question, or by the creator of the trust. It is for the Court to decide whether the trust when properly construed fills the legal conception of a charitable trust: *In re Cranston* (1) and *In re Hummeltenberg*. (2)

Further, it is well settled that if the trusts include non-charitable as well as charitable purposes and under the terms of the trust the trustees can apply the whole of the trust fund to the non-charitable purposes, the whole trust fails, and there is no room for any apportionment between the charitable and non-charitable purposes: *Morice* v. *Bishop of Durham* (3); *Hunter* v. *Attorney-General* (4); and *In re Tetley*. (5)

The present case is concerned with a trust for the benefit of animals. Most (if not all) of the reported cases dealing with such kind of trusts have been cited to us in the course of the argument. The authorities show that the broad ground upon which such trusts have been held to be charitable is that they are for the benefit of mankind in that they cultivate a spirit of humanity and mercy towards the brute creation and therefore have an elevating effect on human beings, even although there is nothing in the instrument creating the trust to show that the intention of the creator of the trust was to do otherwise than benefit the animals in whose favour he declared the trusts. This ground obviously affords a wide scope for charitable gifts in favour of animals and renders it extremely difficult to place any definite limit upon such trusts. Moreover, as pointed out by Lord Sterndale M.R. in *In re Tetley* (6), if the purpose to benefit mankind be a good ground for upholding these trusts, it is difficult to see why any philanthropic purpose to benefit mankind on all sides should be a bad one.

However that may be, the Court of Appeal in *In re Wedgwood* (7), in a reserved judgment, affirmed the principle

(1) [1898] 1 I. R. 431.
(2) [1923] 1 Ch. 237.
(3) 10 Ves. 522.
(4) [1899] A. C. 309.
(5) [1923] 1 Ch. 258; affirmed sub nom. *Attorney-General* v. *National Provincial Bank* [1924] A. C. 262.
(6) [1923] 1 Ch. 258, 266.
(7) [1915] 1 Ch. 113.

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which Romer J., in my opinion, rightly held to govern the decision in the present case. In that case the trust was a general trust for the protection and benefit of animals, the trustee being given an absolutely free hand to use his judgment as cases arose where he thought he could be of use to animals, the testatrix assenting to the trustee's suggestion that helping to forward the movement for the humane slaughtering of animals and the movement to provide municipal abattoirs where animals could be properly and decently slaughtered were the sort of purposes, amongst others, which she would like to have forwarded. All the arguments which were addressed to us in the present case were addressed to the Court of Appeal in that case, but notwithstanding those arguments and the wide generality of the terms of the trust the Court of Appeal unanimously held that the trust was a valid charitable trust. Lord Cozens-Hardy M.R., after referring to the relevant authorities, said (1): "In my opinion it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty." Kennedy L.J. (2) adopts as one of the main grounds of his decision the following passage from the judgment of Chitty J. in *In re Foveaux* (3): "Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men." And Swinfen Eady L.J. says (4): "A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race." The

(1) [1915] 1 Ch. 117.
(2) [1915] 1 Ch. 113, 120.
(3) [1895] 2 Ch. 501, 507.
(4) [1915] 1 Ch. 113, 122.

Court accordingly made a declaration that the residue of the testatrix's estate was subject to the trust for the application thereof as to both capital and income for the protection of animals in such manner as the trustee should think fit, and that such trust was a good and valid trust for a public and charitable purpose. This decision is binding on us, and the only question is whether the present case can properly be distinguished from that case so as to exclude the principle upon which it was decided.

The testatrix's will was made in 1925, some ten years after the decision in *In re Wedgwood.* (1) It is a lawyer's will, as appears both from the language employed and from the names and descriptions of the attesting witnesses. The draftsman was evidently acquainted with the Mortmain Acts and with the technical meaning of the word "charitable." Conveyancers had no doubt at that time accepted the decision in *In re Wedgwood* (1) as correctly interpreting the law.

By the will the trustees were directed to establish (without the acquisition of any interest in land which could not lawfully be acquired and held for charitable purposes) and maintain a charitable institution to be called "The Beaumont Animals Benevolent Society" under such rules and regulations and under such committee of management as the trustees should in their absolute discretion think fit. The members of the committee and of the governing body and all officials were to be and always to have been declared anti-vivisectionists and opponents of all sports involving the pursuit or death of any stag deer fox hare rabbit bird fish or any other animal. It is plain therefore that the society so to be established was intended to be a charitable society in the technical sense and that the trustees were not to acquire any land for its purposes which could not lawfully be acquired and held for charitable purposes. The will then goes on to declare the objects of the society, which broadly speaking are (1.) the provision of a sanctuary or sanctuaries for animals in the United Kingdom; (2.) the distribution of income amongst

(1) [1915] 1 Ch. 113.

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British and foreign homes for the benefit of animals; and (3.) the provision endowment or support of hospitals or homes for animals in Great Britain. The first of these objects if carried out necessarily involves the acquisition of land, the third may or may not involve such acquisition and the second does not involve any such acquisition. As I read the will the trustees are not bound to carry out all these objects, but they cannot travel outside them.

As regards the first object the will provides that if a competent authority (which as regards land in England and Wales would be the Court or a judge or the Charity Commissioners under s. 8 of the Mortmain and Charitable Uses Act, 1891) should sanction the acquisition of land for that purpose the trustees should acquire land in any part of the United Kingdom of Great Britain and Ireland for the purpose of providing a refuge or refuges for the preservation of all animals birds or other creatures not human which being ferae naturae might be living on the land at the time of purchase or being ferae naturae or otherwise might be brought to and placed on the land by or with the consent of the committee and so that all such animals should there be safe from molestation or destruction by man. Then follows a direction making provision for (inter alia) the employment of such custodians keepers and other persons as might seem necessary and proper. And finally if the purchase of the land should by law require the sanction of a judge of the Chancery Division or Charity Commissioners or other competent authority a power to take the necessary steps to obtain such sanction, whether by means of a private Act of Parliament or otherwise.

In my opinion the testatrix in declaring this object of the society has made it sufficiently plain that her intention was that her trustees should establish a sanctuary or sanctuaries for the protection and benefit of (1.) all the wild animals living on any land acquired for such sanctuary or sanctuaries at the date of its acquisition, and (2.) all the wild or domesticated animals which the trustees might thereafter cause to be brought upon such land. As appears from the will, the

testatrix was an opponent of all forms of sport involving the pursuit and destruction of animals. The stipulation that the persons entrusted with the management of the society should be opponents of such forms of sport shows that her primary intention in providing the sanctuary or sanctuaries was to protect the animals from molestation or destruction by persons engaged in the sports of hunting, shooting and fishing, although, no doubt, other forms of molestation and destruction were not excluded.

In my opinion, the trust so created is a trust for the protection of animals and comes within the principle of the decision in *In re Wedgwood.* (1) The sort of protection which the testatrix in that case contemplated was protection against unnecessary cruelty by butchers in slaughtering domesticated animals for human food, whereas the sort of protection which the testatrix in the present case contemplates is protection against what she conceives to be the unnecessary cruelty by sportsmen in pursuing and killing wild animals, whether destined for food or only pursued or killed for sport. In both cases the trusts actually declared extend beyond the form of protection particularly mentioned by the creators of the trusts. It seems to me that the establishment of such a sanctuary or reserve as the present testatrix contemplated is well within the scope of the trust which was declared by the Court in *In re Wedgwood* (1) to be a valid charitable trust. To hold that the present case does not come within the principle upon which that case was decided would, in my opinion, be drawing too fine a distinction between the cruel killing by butchers and the cruel pursuit and killing by sportsmen, and would further add to the complication of a subject already sufficiently complex. The only real distinction between *In re Wedgwood* (1) and the present case is that in the former every right-minded person would agree as to the cruelty against which the animals were to be protected, whereas in the latter there is a sharp difference of opinion upon the subject; but it cannot be denied that there is a large section of the community which is convinced that

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hunting, shooting and fishing are sports involving cruelty to animals.

The contention that the trust is bad because it includes the protection of animals which are noxious both to mankind and to their fellow animals is, I think, met sufficiently by the answer given by the Court to the same contention in *In re Wedgwood* (1)—namely, that the trust must be construed in a reasonable and common-sense manner. The trustees are given ample power of regulation and management. There is nothing that I can see in the trust to warrant the contention that there is an imperative obligation to allow destructive animals to invade or unduly multiply themselves in the reserves. With proper custodians and keepers there would be no practical difficulty in carrying out the object which the testatrix had in view according to both the letter and spirit of her will, and however much I may personally differ from the views which she advocates, I think that a reserve conducted on rational lines would do more towards cultivating a spirit of humanity and mercy towards the brute creation and have a more elevating effect on human beings than many of the trusts in favour of animals which have been upheld as valid charitable trusts, such as for instance trusts to protect animals from vivisection.

Although I am content to rest my judgment on the ground that according to the authorities as they now stand the present trust is a valid charitable trust, I am not satisfied that even if that view be wrong the trusts of the residue would necessarily fail.

The provision that the society should be established without the acquisition of any interest in land which could not lawfully be acquired for charitable purposes seems to me capable of being construed as being in the nature of a fundamental and overriding condition, and accordingly rendering such of the trusts of the society as involve the acquisition of land conditional on the trustees being able lawfully to acquire and hold the land necessary to carry out those trusts, with the consequence that unless and until

(1) [1915] 1 Ch. 113.

the trustees are in a position to comply with such overriding condition either by having obtained the sanction of a competent authority to the acquisition of the necessary land for the purposes of the refuge or refuges (as stipulated in the introductory words of the first object), or by obtaining a private Act of Parliament, as mentioned at the end of this object, they would be committing a breach of trust in applying any part of the trust fund in carrying out the purposes of this object. The draftsman of the will may have foreseen the possibility of the trusts to establish a sanctuary being held to be non-charitable, and therefore in order to preserve the strictly charitable character of the gift of residue may have thought it prudent to insert the overriding conditions to which I have referred so as to prevent the trustees from spending any part of the trust fund of the charity upon any of the objects involving the acquisition of land without first making certain that the necessary land could lawfully be acquired and held by them for the purposes for which it was required. The reference to obtaining a private Act of Parliament is difficult to understand on any other interpretation. If this be the true view the effect would be that unless the purposes of the first object were in fact charitable in the technical sense the trustees could not lawfully acquire and hold land for such purposes without obtaining Parliamentary sanction, and in the absence of such sanction they would not be justified in expending any part of the trust fund in carrying out that object, but would have to apply the trust funds wholly for one or other of the charitable purposes specified in the second and third objects. As however this point has not been elaborated by counsel, I abstain from expressing any concluded opinion upon it.

There remain only two subordinate points to be mentioned. The first of these is that the trusts of the second object are not wholly charitable in that they include trusts for individual animals, and the second is that the whole trusts of the residue fail, because it would be impossible to find any trustee who had always been a declared anti-vivisectionist and opponent of the sports mentioned in the will.

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Romer J. has dealt with both these points, and I entirely agree with his reasons for holding that they afford no answer to the Attorney-General's contention that the trust created by the testatrix is a valid charitable trust.

In the result I think that the appeal ought to be dismissed, but as my colleagues think otherwise, it will be allowed.

RUSSELL L.J. There can be no doubt that upon the authorities as they stand a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public; for if this be a necessary result of the execution of the trust, the trust will fall within Lord Macnaghten's fourth class in *Pemsel's Case* (1)—namely, "trusts for other purposes beneficial to the community."

So far as I know there is no decision which upholds a trust in perpetuity in favour of animals upon any other ground than this, that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind. I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point: and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another.

The cases have accordingly run to fine distinctions, and speaking for myself I doubt whether some dispositions in favour of animals held to be charitable under former decisions would be held charitable to-day. For instance, anti-vivisection societies, which were held to be charities by Chitty J. in *In re Foveaux* (2), and were described by him as near the border line, might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities.

The difficulty arises when you apply the test of benefit to the public to each particular case. The will of Mrs. Grove-Grady is no exception, for it presents a very difficult problem.

Clause 8 of her will contains an out and out gift of 10,000*l.* to the Royal Society for the Prevention of Cruelty to Animals

(1) [1891] A. C. 531, 583. (2) [1895] 2 Ch. 501, 507.

for a particular purpose, but subject to a certain condition. No question arises under this clause, for the legacy was declined and the sum fell into residue: but the condition ran thus: "Provided . . . . that at the date of payment . . . . the chairman and members of all the committees and the secretaries serving at the headquarters . . . . shall then be and always previously have been anti-vivisectionists as regards their opinions, and shall be opposed to all sports involving the pursuit or death of any stag deer fox hare rabbit bird fish or any other animals ferae naturae." This provision was relied upon as throwing some light on the subsequent provision as to residue.

The residuary estate is disposed of by clause 12; by which the trustees of the will are directed to stand possessed of the residuary proceeds of the sale and conversion of her real and personal estate and all income thereof until sale and conversion —thereinafter called "the trust fund" upon trust for the founding and establishing and thereafter upholding and maintaining an institution to be called "The Beaumont Animals Benevolent Society."

The testatrix calls the proposed institution a "charitable institution"—but this will not make the trust valid if in law the institution is not charitable. To ascertain this we must ascertain the objects of the institution and the purposes for which the moneys may consistently with the terms of the trust be applied.

After providing for the making of rules and regulations by the trustees and providing that the committee, the governing body and all officials "shall be and always have been declared anti-vivisectionists and opponents of all sport involving the pursuit or death of any animal," the testatrix defines the objects of the Beaumont Animals Benevolent Society. They are three in number. The contest in the present case has centred mainly round No. 1.

This, as I read it, is the provision and maintenance of a sanctuary or sanctuaries for animals: the relevant words being (for the moment I pass by the reference to the purchase being sanctioned) "the purchase of . . . . lands of any tenure

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. . . . in any part or parts of the United Kingdom of Great Britain and Ireland . . . . for the purpose of providing a refuge or refuges for the preservation of all animals birds or other creatures not human which being ferae naturae may be living on such land at the time of the purchase thereof or which being ferae naturae or otherwise may be brought to and placed on such land . . . . by or with the consent of the committee . . . . and so that all such animals birds or other creatures not human shall be safe from molestation or destruction by man, and I declare that out of the trust fund provision shall be made by and at the discretion of the committee . . . . for the maintenance upkeep and preservation of such lands and buildings and the walls fences and hedges thereof including the employment of such custodians keepers or other persons as may seem necessary or proper."

That is the first object of the contemplated society.

Two points call for remark at this stage.

I have described it as the provision of a sanctuary for animals. The strict wording limits the animals to (*a*) animals ferae naturae which were living on the land at the time of purchase and (*b*) animals whether ferae naturae or otherwise subsequently brought on the land by or with the consent of the committee. Animals subsequently coming on to the land either voluntarily from outside or as lineal descendants of animals within class (*a*) do not fall within the definition of the beneficiaries. In view, however, of the impossibility of compiling a reliable census of the original inhabitants under class (*a*) it would be wrong to adopt so strict a construction. Indeed to carry out the trust would be an impossibility, unless you acted as though the strict construction did not prevail, and as though all animals in the sanctuary (except such as were brought there by human agency without the leave of the committee) were objects of the trust and were to be kept safe from molestation or destruction by man. I think all animals for the time being on the land, except such as have been brought there by human agency without the leave of the committee, must be considered as beneficiaries.

The second observation is this. I am unable to treat the will as providing that the application of the trust fund to object No. 1 shall be in any way dependent upon the Chancery Division or the Charity Commissioners or any other authority giving its sanction to the purchase of the land. Nor can I assent to the view that any such authority (if its sanction were needed to the purchase) could or would take advantage of the fact to impose terms so as to alter in any way the provisions of the will and turn a non-charitable trust into a charitable trust. The references in object No. 1 to the assent or sanction of some competent authority only apply if the land purchased is in England. There is nothing to prevent the trustees giving full effect to object No. 1 without being under any necessity of applying for any sanction, if the land be purchased in Ireland or Scotland.

Now let me assume that the society is formed and that its funds are applied in the following manner, which I believe to be strictly in accordance with the terms of the will under object No. 1: A stretch of land is bought. It is enclosed. Animals are (or are not) introduced thereon by the committee. A staff of custodians, keepers and other persons is engaged. Their only functions according to the trust would appear to be to see that the animals there are safe from molestation or destruction by man. Except for that, the trust contemplates nothing beyond the provision of the land as an abode for the animals.

Assuming that I have correctly interpreted object No. 1, it comes down to this, that the residuary estate may be applied in acquiring a tract of land, in turning it into an animal sanctuary, and keeping a staff of employees to ensure that no human being shall ever molest or destroy any of the animals there. Is that a good charitable trust within the authorities?

In my opinion it is not. It is merely a trust to secure that all animals within the area shall be free from molestation or destruction by man. It is not a trust directed to ensure absence or diminution of pain or cruelty in the destruction of animal life. If this trust is carried out according to its

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tenor, no animal within the area may be destroyed by man no matter how necessary that destruction may be in the interests of mankind or in the interests of the other denizens of the area or in the interests of the animal itself; and no matter how painlessly such destruction may be brought about. It seems to me impossible to say that the carrying out of such a trust necessarily involves benefit to the public. Beyond perhaps hearing of the existence of the enclosure the public does not come into the matter at all. Consistently with the trust the public could be excluded from entering the area or even looking into it. All that the public need know about the matter would be that one or more areas existed in which all animals (whether good or bad from mankind's point of view) were allowed to live free from any risk of being molested or killed by man; though liable to be molested and killed by other denizens of the area. For myself I feel quite unable to say that any benefit to the community will necessarily result from applying the trust fund to the purposes indicated in the first object.

If then benefit to the community as a necessary result of the execution of the trust is essential, this trust is not charitable. It is well settled that if consistently with the trust the funds may be applied for a purpose not charitable, the trust will fail for perpetuity notwithstanding that the funds might under the trust have been applied for purposes strictly charitable.

It was, however, argued before us that a trust merely for the protection and benefit of animals must be a good charity, and for this proposition reliance was placed on the decision of this Court in *In re Wedgwood*. (1) That case is of course binding upon us as a decision, and requires careful consideration.

If the argument on this point means that it is unnecessary to find a benefit to the community as an ingredient of the charitable trust, in other words that a gift for the benefit of animals simpliciter which involves no such benefit is a good charity, the answer is that *In re Wedgwood* (1) decides

(1) [1915] 1 Ch. 113.

no such thing. All the members of the Court discovered in the trust a benefit to the community. Unless such a benefit is involved in the trust, you could not bring the case within Lord Macnaghten's fourth class in *Pemsel's Case.* (1)

If the argument is this, that *In re Wedgwood* (2) lays down as a principle that every trust for the protection and benefit of any animals necessarily involves a benefit to the community and is therefore charitable, again the answer is that *In re Wedgwood* (2) lays down no such principle.

It was a peculiar case in this, that the trust was a secret trust declared orally. To ascertain the scope of the trust all the verbal statements made by the testatrix had to be regarded. The testatrix had explained the nature of the methods by which she desired her estate to be applied for the protection and benefit of animals—namely, in obtaining for them the benefit of humane slaughtering, i.e. avoidance of cruelty. All the members of the Court refer to that fact in their judgments; and from that they were able to spell out public benefit. Except for that purpose, there was no occasion to refer to that fact at all. Lord Cozens-Hardy says (3): "It tends to promote public morality by checking the innate tendency to cruelty." Kennedy L.J. (4), in reviewing what he calls the particularly pertinent decisions, relies on those in which it is pointed out that the prevention of cruelty to animals is for the benefit of the public. Swinfen Eady L.J. seems quite clear on the point. After referring to the explanation of the testatrix above mentioned he uses this language (5): "The object of the trust being thus ascertained and defined, the question arises, is this a valid charitable trust?" He says that it is, because it is a gift for a general public purpose beneficial to the community. He arrives at that view, because (amongst other things) the discouragement of cruelty promotes humane sentiments in man towards the lower animals and elevates the human race. It seems to me that the decision in *In re Wedgwood* (2) is definitely based on the view that

(1) [1891] A. C. 531, 583.
(2) [1915] 1 Ch. 113.
(3) [1915] 1 Ch. 113, 117.
(4) Ibid. 120, 121.
(5) [1915] 1 Ch. 122.

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the object of the trust being discouragement of cruelty to lower animals, that, upon the existing authorities, involved benefit to the community.

The Court in *In re Wedgwood* (1) was certainly not purporting to lay down any new law. It is not, in my opinion, a decision either (1.) that every trust for the benefit of animals necessarily involves benefit to the community, or (2.) that a trust for the benefit of animals which involves no such benefit is a charitable trust.

In my opinion, the Court must determine in each case whether the trusts are such that benefit to the community must necessarily result from their execution.

In the present case I cannot persuade myself that the trusts described by the testatrix under the head of the first object fulfil that description. To do so would go beyond any decided case. The authorities have, in my opinion, reached the furthest admissible point of benevolence in construing, as charitable, gifts in favour of animals, and for myself, I am not prepared to go any further.

I think Romer J. erred in this case in attributing too wide an effect to the decision in *In re Wedgwood.* (1) He takes the view, I think, that the case decided, or that the decision involves, that every gift for the benefit of the lower animals must tend to promote public morality, and must therefore be charitable. As indicated above, I do not take this view. I think the decision covers a much narrower field and is based upon the expressed desire of the testatrix to diminish cruelty, out of which the Court felt itself able to find that benefit to the community must necessarily follow from the execution of the trust.

I agree with the order suggested by the Master of the Rolls.

Appeal allowed.

Solicitors for appellants: *Iliffe, Sweet & Co., for Laycock, Dyson & Laycock, Huddersfield.*

Solicitors for Attorney-General: *Treasury Solicitor.*

Solicitors for trustees of will: *Pennington & Son.*

(1) [1915] 1 Ch. 113.

W. I. C.

In re LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED.

LLOYDS BANK, LIMITED *v.* THE COMPANY (No. 2).

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[1928. L. 281.]

Workmen's Compensation—Company—Debentures—Floating Charge—Debenture Holders' Action—Appointment of Receivers—Workmen of Company then in receipt of weekly Payments as Compensation for Injuries—Preferential Creditors—Payment to Workmen of outdoor Relief—Claim by Guardians for Reimbursement—"Pending settlement of his claim"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 107—*Workmen's Compensation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 7, 13, 41.

In an action brought by debenture holders against a company to realize their security receivers were appointed of the assets comprised in the debentures. At the date of their appointment there were a number of workmen in receipt of weekly payments from the company as compensation for accidents suffered by them causing total or partial incapacity. These payments having ceased on the appointment of the receivers, the workmen were paid outdoor relief by the guardians.

On an application by the guardians under s. 41 of the Workmen's Compensation Act, 1925, for repayment of the money so expended by them :—

Held, that the words "pending the settlement of his claim" in s. 41 did not refer to the settlement of the workman's claim by the payment of a lump sum, but to the settlement of compensation by an award or by agreement between the workman and the employer.

Held, therefore, that as the claims of the workmen in the present case had long since been settled by the company by the weekly sums, the guardians were not entitled to the repayment they claimed.

Decision of Clauson J. reversed.

APPEAL from a decision of Clauson J. in chambers.

The circumstances under which the claim in this case arose are fully detailed in the report of a previous application in the same action : see ante, p. 493. They were shortly as follows :—

The defendant company, the Lewis Merthyr Consolidated Collieries, Ld., were large colliery owners, and had from time to time become liable to workmen in their employment in respect of accidents suffered by them causing total or partial incapacity.

On February 8, 1928, the plaintiffs, Lloyds Bank, Ld., who were debenture holders of the defendant company

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commenced the present action against the defendant company to realize their security, and on February 14, 1928, receivers were appointed in the action of all the property and assets of the defendant company (except uncalled capital) comprised in or subject to the charge created by the debentures.

On April 27, 1928, Frederick Densley, a member of the South Wales Miners' Federation, who claimed to be entitled to compensation for injuries sustained while an employee of the defendant company, was appointed to represent the class of workmen claiming to be entitled to compensation from the defendant company under the Workmen's Compensation Acts, 1906 to 1923, or the Act of 1925, and to priority and preferential payment of arrears for such compensation (if any), by virtue of the Companies (Consolidation) Act, 1908, ss. 107 and 209.

The present summons was taken out by the Pontypridd Board of Guardians for an order that the receivers appointed in the action should repay to them the money which the guardians had expended in granting relief to certain workmen of the defendant company who at the date of the appointment of the receivers were in receipt of weekly payments by way of compensation for accidents suffered by them, causing total or partial incapacity.

The guardians based their claim on s. 41 of the Workmen's Compensation Act, 1925, which, so far as material, was as follows :—

"Where an authority has granted out-door relief to a person pending the settlement of his claim to compensation under this Act . . . . and either—(*a*) such relief would not have been granted had the person then received or been in receipt of compensation under this Act ; or (*b*) such relief is in excess of the amount which would have been granted had the person then received or been in receipt of such compensation ; the authority may give notice of the relief so provided to the person liable to pay the compensation, and if such notice is given the person so liable shall on demand, and on being furnished with a certificate by the authority of the amount of the relief so provided or of the amount of such excess, as

the case may be, repay to the authority, up to the amount which he is liable to pay as compensation, less such part (if any) of that amount as he has already duly paid at the time of receiving the notice aforesaid. . . . ."

The summons was heard before Clauson J. in chambers, who made the order asked for, being of opinion that each workman had, in the events which had happened, a claim by virtue of s. 7, sub-s. 3, of the Act of 1925 to be paid as a debt, compensation by way of a lump sum payment, and that as the amount of that lump sum payment had not been ascertained the settlement of the workman's claim to compensation under the Act was pending within the meaning of s. 41. He further certified that the matter had been fully argued before him in chambers in order that an appeal might be taken direct to the Court of Appeal.

F. Densley appealed. The appeal was heard on December 18, 1928.

Trevor Hunter K.C. and *L. W. Byrne* for the appellant. The question turns on the construction of ss. 40 and 41 of the Act of 1925. Sect. 40 contains a general prohibition against charging or assigning weekly payments. Sect. 41 contains an exception to that prohibition, and must be strictly construed. The words "pending the settlement of his claim" in s. 41, it is submitted, mean pending the making of an award by an arbitrator or of an agreement by which the workman would become entitled to compensation. The guardians are not entitled to claim under that section in respect of weekly payments to workmen to which they were already entitled.

There has here been no settlement of a claim for compensation since the appointment of the receivers. There were no claims to be settled, as they had been settled long ago by the defendant company.

[They were stopped.]

A. T. James K.C. and *Stanley Evans* for the guardians. Under s. 13 of the Act the employer can redeem a weekly

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payment by a lump sum calculated in the manner thereby provided. By s. 7 the claims of an injured workman are given priority on the appointment of a receiver in a debenture holders' action, and by sub-s. 3 it is provided that: "Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purpose of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under this Act." The guardians are entitled, it is submitted, to be repaid the amounts expended by them in outdoor relief on the ground that workmen's claims, as from the date of the appointment of the receivers, when the weekly payments were stopped, were pending settlement within the meaning of s. 41 by the ascertainment of the lump sums payable for redemption. The words of the section are sufficiently wide to cover the period up to the time of the employers being finally discharged from liability.

It was contended that a workman's claim is settled when the employer admits liability: see s. 21. But what is then settled is the question which has now arisen. The question of compensation is always open until it has been finally disposed of by the payment of a lump sum to the workman.

When once a receiver has been appointed the right of the workman to receive weekly payments ceases and is converted into a right to receive a lump sum. Therefore on the appointment of the receivers in this case a question would arise between the workmen and the receivers as to the ascertainment of the amounts of those lump sums. That question is still pending, and the guardians are therefore entitled to the order they ask.

H. C. Bischoff for the plaintiffs in the action.

LORD HANWORTH M.R. By the Workmen's Compensation Act, 1925, s. 1, there is imposed upon the employers liability to their workmen for personal injuries suffered by reason of accident arising out of and in the course of the employment. If an accident happens and injury is caused, the workman

has a right to have the amount of compensation ascertained. If it is a case where, unfortunately, death has supervened, then the compensation is to be settled under s. 8, and a lump sum then is paid for the widow and for the dependants. In the case of total or partial incapacity, where the workman is still living, it is provided by s. 9, sub-s. 1: "The compensation under this Act, where total or partial incapacity for work results from the injury, shall be a weekly payment during the incapacity."

There are a number of sections which define who is a workman, who is an employer, make rules for estimating earnings, and the like. Still, the dominant features of the Act are those to which I have referred—namely, the provisions in s. 1, as to the liabilities imposed upon the employer, and the provisions in ss. 8 and 9, whereby compensation is to be given in the case either for the supervening death or for the total or partial incapacity. As I have pointed out, in that last case it is by means of weekly payment during the incapacity; and of course there are other conditions for determining what the earnings of the workmen were, and the like. There are also other conditions imposed upon the workman, such as under s. 14, that he must make a claim for compensation within a limited time, and it is in s. 14 that you get the provisions, which are of importance to the employers, whereby notice has to be given of the accident and a claim for compensation made by the workman who says that he has suffered by reason of it. When those preliminaries have been satisfied, if the claim made under s. 14 is not acceded to by the employers, provision is made under s. 21, whereby the question or dispute which has thus arisen between the workman and the employer can be settled by arbitration.

It may be that when the weekly payments have been made for a certain time the employer thinks that the amount being paid oversteps the mark of the incapacity of the workman. He can then apply under provisions made for a review of the case; and also after the payments have continued for six months the employer can apply under s. 12 for liberty to redeem the amount which he has paid. Under

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that section it is to be observed that the only person who can set it in motion is the employer; the workman cannot do so. That being the process of giving compensation to the workman, there is a definite prohibition contained in s. 40, which preserves to him inviolable this compensation. The section provides: "A weekly payment payable under this Act or any scheme certified under this Act, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same." It is to my mind quite plain, after reading the sections to which I have referred, that the intention of the Act is to give an inalienable right to the workman to receive the compensation at the rate provided for in the sections and on the basis laid down, and that that sum is to be paid to him as a weekly payment continuing unless and until incapacity has ceased or unless and until the employer has secured under s. 13 the redemption of the weekly payments by payment of a lump sum.

We have now to construe s. 41. What has happened in this case, the case of a large colliery company employing a large body of workmen, is this: two receivers on behalf of debenture holders were appointed on February 14, 1928. The result of that appointment was to stop the weekly payments which were then being made by the colliery company to their employees who had suffered injury by accident arising out of and in the course of their employment. A very large colliery company must have a certain number of persons who have unfortunately suffered in accidents and who are claimants upon their funds in respect of the rights granted to them by the Workmen's Compensation Acts. By s. 7 of the Workmen's Compensation Act, 1925, it is provided that in the event of a company having commenced to be wound up or a receiver or manager of the company's business or undertaking having been duly appointed, or possession having been taken, by or on behalf of the holders of debentures secured by a floating charge of the property comprised in or subject to the charge, there shall be included

amongst the debts which under s. 107 of the Companies (Consolidation) Act, 1908, " are to be paid in priority to any claim for principal or interest in respect of debentures ; the amount due in respect of any compensation or liability for compensation accrued before " certain specified dates. In the present case when the receivers were appointed on February 14 there were a number of workmen employed by the colliery company who were entitled to compensation and who were entitled to have weekly payments made according to rates ascertained, settled, and finally adjusted between them and the colliery company. At that time all the claims which we are considering had been crystallized into the form of definite weekly payments. None of the cases which are before us are those in which no finality had been reached ; all of them are cases in which the measure of compensation had been determined one way or the other between the workman and the colliery company. Thus s. 7 did provide that those workmen, inasmuch as there was an amount due in respect of compensation before the receivers were appointed on February 14, were entitled to priority under the terms of s. 107 of the Companies (Consolidation) Act, 1908. Sub-s. 3 of s. 7 of the Workmen's Compensation Act, 1925, also provides : " Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under this Act." That provision only effects this, that whereas there might be some uncertainty as to the quantum in respect of which the workman was entitled to his priority, in lieu of his weekly payments being estimated on any other basis it is provided that his proof shall be taken at the sum which would have been reached if his employer had set in motion the redemption proceedings under s. 13. It is really a provision for an alternative to the claim of the workman. His claim is for compensation. He is entitled to priority in respect of that compensation, but the actual quantum, so far as the receivers in this case are

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concerned, is to be taken to be the amount of the lump sum ascertained in redemption proceedings; and in respect of that lump sum he may be paid in the course of the action, notwithstanding his priority, not the full amount of his claim but only the aliquot part of it, according to the amount of the funds available in the hands of the receivers. But it is to be observed that this method of ascertaining in respect of what amount the priority is to stand good is only a method which is subsidiary to the right of priority which is given under s. 107 of the Companies (Consolidation) Act, 1908, to certain persons, which right of priority is applied to workmen under the Workmen's Compensation Act by virtue of s. 7 of the Workmen's Compensation Act, 1925.

Sect. 41 provides for certain repayments of poor relief. In a large number of cases during the time before the dispute in question as to what the compensation shall be to which the workman is entitled in respect of the accident, there must be a lapse of time, and during that lapse of time he may have to seek the assistance of the guardians and ask to be granted out-door relief. By s. 41 it is then provided that "Where an authority has granted out-door relief to a person pending the settlement of his claim to compensation under this Act," and certain conditions are fulfilled, then there shall be a right of deduction from the amount which is coming to the workman up to the amount for which relief has been given or as set out in detail in the body of the section. But before the guardians can claim to have that deduction made the early portion of s. 41 must be fulfilled, which provides: "Where an authority" —that is the Pontypridd Board of Guardians in this case— "has granted out-door relief"—and they have done so in this case to a number of workmen—"to a person pending the settlement of his claim to compensation." What they have done is that since February 14, when the receivers were appointed and no further weekly payments were made as sums ascertained to be due from the employers, the Pontypridd Guardians have granted relief to these injured workmen. Is that relief so given out-door relief given to a person "pending

the settlement of his claim to compensation"? The workman says: "No; my claim to compensation was settled long before February 14. My rights were ascertained and the employers were paying me. There was nothing between us at all." It appears to me that that contention of the workman is right, and that the settlement of the claim to compensation which is referred to is the settlement of the claim which has to be made within a certain time under s. 14 of the Act—that is, the claim to compensation arising out of the accident, a claim which has to be determined in accordance with the principles of the other sections to which I have referred. That is the settlement the pending of which connotes the period during which the guardians can give relief to a workman and yet hope to recover from the workman the sums which they have advanced by way of that relief.

Clauson J. has taken a different view. He has taken it that there is a claim pending, because the amount of the sum to be paid by the receivers has not yet been ascertained. As I have pointed out, the priority is given to the workman. He is by virtue of s. 7 of the Workmen's Compensation Act, 1925, given and allowed to have a priority which is granted by s. 107 of the Companies (Consolidation) Act, 1908; and if there is any claim arising between the receivers and the workman it is a claim in respect of the priority which is given to the workman under s. 107 of the Companies Act. More than that, it appears to me that the amount for which priority is to stand is that amount to which I have already referred and which is to be taken to be the right amount —namely, the sum for which the weekly payment could be redeemed; and the words "to be taken to be" in sub-s. 3 of s. 7 to my mind clearly indicate that it is not the actual amount, but a sum which is to be in the place of and by way of an alternative to the sum which was otherwise being paid to the workman by way of compensation.

With those observations, it appears to me that it cannot be said that at the present time there is any settlement of the workmen's claim pending. The words are fully satisfied by holding that they apply to the time when and during

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which there is a question to be settled between the employer and the workman before ever the original weekly payment is ascertained between them. When that weekly payment has been ascertained and is being paid, there is then no longer the settlement pending as to the amount to be paid; it has passed into the realm of matters which are settled by the award of the county court judge, and what was a pending question has come to be one which has been resolved by the award given in the favour of the workman.

For these reasons it appears to me that the Pontypridd Guardians are unable to claim that the sums which they have advanced since the order for the appointment of receivers was made are sums which have been advanced to the workmen pending the settlement of their claims to compensation, and thus that they do not bring their rights within the earlier portion of s. 41, which must be satisfied if they are to overcome the prohibition which is laid down in s. 40.

For these reasons the appeal must be allowed.

LAWRENCE L.J. I agree. This case raises a short point as to the true meaning of the expression, "pending the settlement of his claim to compensation under this Act" contained in s. 41 of the Act of 1925. The appellant contends that the "claim" there referred to is the claim for compensation mentioned in s. 14, and that "the settlement of his claim" is either when that claim has been agreed or if there is a dispute, when the proceedings for settling such dispute have terminated; and consequently that the expression means pending the conclusion of such an agreement or the termination of such proceedings; in other words, when the existence and the amount of a claim for compensation under the Act have been established.

The learned judge has not adopted that view, but has construed the expression as extending to what he describes as a claim to compensation arising under s. 7, sub-s. 3 (iii.), of the Act, owing to an order having been made for the appointment of receivers of the employers' undertaking.

As between these two constructions I think that the appellant's is the right one. Sect. 7, sub-s. 3 (iii.), deals with what is to be included amongst the debts, which under s. 107 of the Companies (Consolidation) Act, 1908, are to be paid in priority to any claim for principal or interest in respect of debentures; and by s. 7, sub-s. 3, there is so included the amount due in respect of any compensation or liability for compensation accrued before the date when the receivers were appointed. The section goes on to quantify that claim by reference to s. 13, under which the employer is enabled to redeem the weekly payments. All that this amounts to, therefore, is this: Sect. 7 enacts that there shall be included under s. 107 of the Companies (Consolidation) Act, 1908, for the purpose of ascertaining the priorities thereby dealt with, a claim under the Workmen's Compensation Act, which is either settled or liable to be settled under the latter Act. In my opinion that enactment does not create a claim to compensation under the Workmen's Compensation Act at all. It merely includes amongst the preferential debts of the company under the Companies Act of 1908, any claim which the workman has under the Workmen's Compensation Act, and prescribes the method of ascertaining the amount of that claim for the purpose of the administration of the affairs of the employers. To state my conclusions in a sentence: the claim referred to in s. 41 is a claim for compensation under the Workmen's Compensation Act, and the settlement of that claim therein referred to is a settlement of the liability of and of the amount payable by the employer under that Act.

There is only one other matter to which I desire to refer. Mr. James contended that even if the claim be confined to a claim under the Act, yet under s. 41 the settlement of the claim means payment in full, and that until the claim has been entirely satisfied and disposed of it remains unsettled. In other words, his contention was that the settlement of the claim for compensation remained pending until the employer had been absolutely discharged from any liability to pay compensation under the Act. In my opinion that is not the

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right view. The section itself contrasts the settlement of a claim to or for compensation with the payments to be made in respect of the claim; and I think it impossible to hold that "pending the settlement of his claim to compensation" in s. 41 means until such time as the whole of the payments under the Act had been exhausted and the liability of the employer in respect of the claim had come to an end.

For these reasons I agree that the appeal ought to be allowed.

RUSSELL L.J. I agree that the appeal should be allowed, and inasmuch as we are differing from the learned judge below, I desire to add a few words in order to state my reasons.

The question which we have to decide resolves itself into this: whether during the period in which this out-door relief was granted by the authority the settlement of the workman's claim to compensation under the Act of 1925 was pending. The argument put forward by Mr. James was that it was pending, because there was a claim by the workman still pending under s. 7, sub-s. 3, of the Act. In order to see whether that is a sound argument it is necessary to turn to s. 7. Sect. 7, sub-s. 3, does this as regards the third case, and does this only. It provides a certain priority over the debentures in favour of the amount due in respect of liability for compensation which has accrued due before the appointment of the receiver. It further provides that the amount due in the case of payment of compensation in the shape of weekly payment shall (and these are noteworthy words) "for the purposes of this provision be taken to be the amount of the lump sum," which would be payable if the employer exercised his right under s. 13 to redeem the weekly payments by payment of the lump sum. That is all that s. 7, sub-s. 3, does; and it is important to bear in mind that it does not confer upon the workman any right to be paid a lump sum. All that it confers upon him is a right to be paid a lump sum in priority to the debentures out of such of the assets as were subject to the floating charge. It

does not impose any liability upon his employer to pay him a lump sum, and the last part of sub-s. 3 is really a provision to prevent the indefinite holding up of the assets for the purposes of securing payments of recurring weekly sums. In one sense it is a provision in favour of the debenture holders, enabling the assets after the lump sums have been paid to be distributed to them. The point which I desire to emphasise is that there is no right conferred upon the workman to a lump sum by s. 7, except a right to be paid out of certain assets in front of the debenture holders. When once one realizes that that is all that is given to the workman by s. 7, it appears to me quite impossible to hold that that can properly be described as "a claim to compensation under this Act" or "the settlement to his claim to compensation under this Act." In my opinion it is nothing of the kind. "His claim to compensation under this Act" has been settled long ago; and all that s. 7 does is to provide machinery by which that claim, which has already been settled, can in certain circumstances be converted into a lump sum, which will be payable out of certain assets in front of the debenture holders.

Appeal allowed.

Solicitors: *Smith, Rundell, Dodds & Bockett, for Morgan, Bruce & Nicholas, Pontypridd; Wrentmore & Son, for Spickett & Sons, Pontypridd; Ingledew, Sons & Brown.*

W. I. C.

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Jan. 11, 14, 15, 16; Feb. 18.

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[1927. M. 3534.]

Trade Union—Rules—Executive Committee—Expulsion from Union—Bias—Committee as "prosecutors"—Domestic Tribunal—Jurisdiction of Court—Action by Tribunal in good Faith.

The Court has no jurisdiction to vary or to set aside the decision of a domestic tribunal if in giving its decision the tribunal has acted honestly in accordance with its own rules and in good faith.

The plaintiff was a member of the defendant union, the rules of which provided (inter alia) that members who or branches which issued addresses or circulars not duly approved by the executive committee or by the general secretary, should be fined and subjected to certain disqualifications. The plaintiff issued several circulars in connection with elections to the executive committee without obtaining such approval. When he stood, some time later, for election as president of the union, the attention of the executive committee was drawn to that fact. The committee thereupon resolved that he be fined and disqualified in accordance with the appropriate rule, notifying him to that effect, and stating at the same time that it had been resolved that his nomination for election as president should not stand. The plaintiff threatened legal proceedings unless the resolution was withdrawn, and this was done, as he had not been heard in his own defence. The plaintiff had also issued without approval an election address. A day was fixed at his convenience for him to be heard in regard to this further breach of the rules. He attended the meeting of the committee, stated his case, and withdrew; and the committee thereupon resolved that he had committed a serious breach of the rule in question, and that he be excluded from membership of the union. The plaintiff claimed a declaration that the resolution was ultra vires and void, and an injunction to restrain the defendant union from enforcing it, the ground for his claim being that the executive committee could not be an impartial body:—

Held, that the Courts had only a limited jurisdiction over domestic tribunals, and could not give redress to members of associations on whom hardship was worked by decisions given honestly and in good faith under the rules of such associations, even though the rules or decisions were unfair or unjust.

Leeson v. *General Council of Medical Education and Registration* (1889) 43 Ch. D. 366 applied.

ACTION.

The plaintiff, Neil Maclean, was a member of the defendant union (hereinafter called "the union"), which was founded in 1898. The union was managed by a general president, a general secretary, and an executive committee. It was a

large organization, with many branches: and among its rules were the following:—

"22 (1.). In the year 1928, and in every third year thereafter, there shall be a conference of delegates of the union.

"(9.) The conference shall—

(*a*) Discuss the general principles and future policy of the union.

(*b*) Deal with any business committed to it by the executive committee, and exercise any of the powers conferred by the rules upon the executive committee in relation to such business.

(*c*) Remit for the further consideration of the executive committee any decision of that body.

(*d*) If it so desire, refer any decision arrived at to the general executive committee for them to carry into effect. Any decision which involves an alteration of rule must be referred to the rules revision committee in accordance with rule 49.

"23 (1.). Members nominated for the offices of general president, general secretary, general executive committee, or trustee, must have been members of the union for at least three years, and in benefit at the time of nomination, and over 21 years of age.

"(2.) No full time official of the union shall be eligible for election to the executive committee other than the presidency or general secretaryship.

"(3.) Every member of the executive committee, the general secretary, and every general officer of the union must, at the time of his election be, and shall remain a member of the union; ceasing to be a member his office shall thereby be vacated.

"(4.) The election of the president, general secretary, executive committee, and trustees shall be by vote in accordance with rule. The voting shall take place during the month of October for those officers whose term of office is expiring that year.

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"(5.) Candidates must be members of a branch within the district in respect of which they are nominated.

"(6.) Candidates for the offices of general president, general secretary, general executive committee or trustee must be nominated by one or more branches of the union.

"(7.) Nominations for office must be received at the chief office not later than the 15th August, and the ballot papers shall be issued at the branches at such time as the executive committee or, failing them, the general officers may determine.

"24 (3.) (*e*). The executive committee may—at their discretion—take the opinion of the members or branches of the union upon any question that may arise.

"45. No address or circular shall be issued by any branch or member unless the same has first been approved by the executive committee or general secretary. Any branch and any member or members of any branch violating this rule shall be fined 2*s*. 6*d*. each, and such member or members shall also be immediately suspended from all benefits of this union, and for one month after fine has been paid. If the executive committee so decide, such member or members may be excluded from membership of this union.

"46 (1.). Any member or members of the union who, in the opinion of the executive committee, shall have injured or attempted to injure the union, or worked or acted contrary to the interests of the union or its members, or have attempted to break up or dissolve the union otherwise than as allowed by these rules, or otherwise brought the union into discredit, or refused to comply with any order or decision of any committee having jurisdiction over the said member or members under these rules, or requested or taken work from any employer at any place where a trade dispute exists between such employer and the union or any branch thereof, or obtained or attempted to obtain any of the benefits of the union by means of misrepresentation or by any improper practice, or have knowingly participated in or been a party to any fraud perpetrated upon the union, or any misappropriation or misapplication of its funds or the funds of any branch or district committee thereof, or acted contrary to

any orders or directions of the executive committee given in connection with any movement or proceeding under the provisions of rule 11, or whose conduct shall have been otherwise inconsistent with the duties of a member of this union, or who, being a branch or district officer or officers, shall have refused to perform the duties imposed upon him by these rules or any of them, may be expelled by the executive committee from the union, and shall thereupon cease to be a member thereof. Every expelled member shall cease to have any claim upon the funds and benefits of the union, and shall forfeit all right to participate in the privileges thereof.

"(7.) In every case notice shall be given to the member of the intention to proceed against him under this rule, and of the grounds or matters which the executive committee are proposing to consider, and every expelled member shall afterwards receive notice of his expulsion and the grounds thereof. The decision of the executive committee shall be final and conclusive, unless an appeal be made as provided by rule 48, which appeal shall be the sole method by which any or every decision given in purported exercise of the powers conferred by this rule shall be questioned, controlled, reversed, or suspended. The decision given upon any such appeal shall be final and conclusive.

"49 (1.) No new rule shall be made, nor shall any rules be rescinded or any amendment made therein, except as hereinafter provided. Any proposed new rules or alterations of rules shall be sent to the branches, who, within one month from the date of sending the same, may send to the executive committee amendments thereto.

"(2.) When any rule is found to be unsatisfactory, the general executive shall take steps to alter the same by an appeal to the members, and a majority vote shall entitle the general executive to obtain the partial revision required, or in case of general revision of rules, or where circumstances in which the general executive committee deem it necessary, there shall be a rules revision committee set up, to be composed as follows: The general officers, the general executive, the

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trustees, the divisional organizers, and two members to be elected from each executive division, one of whom in each division must be a branch secretary.

"(3.) In the case of a general revision, amendments shall be asked for and the period of two calendar months given for branches to remit same. After this the general executive committee shall print and circulate the same to all branches and give two further months for further amendments to the amendments, but no new amendments will be accepted. On the receipt of the final amendments, the whole shall be brought before the revision committee and their decision shall be final. The rules revision committee shall fix the date upon which the new rules become operative."

The plaintiff began duties as a member of the executive committee in 1920. Differences arose between him on the one side, and the then president and general secretary of the union on the other, in regard to proposals put forward by the president and secretary for reductions in the remuneration of the executive committee. Between June, 1925, and April, 1926, charges were made against the executive committee of receiving excessive payment. Following the findings of a sub-committee of a rules revision committee appointed in 1925, an investigation committee specially appointed by a triennial conference recommended that the executive committee, with two exceptions of whom the plaintiff was not one, be asked to resign and be barred from office for ten years. This recommendation was approved upon a general ballot of the union, and the executive committee accordingly resigned; but most of the resigning members, including the plaintiff, stood for re-election. In connection with the said ballot, the plaintiff had issued a circular in January, 1927; and he now, a month later, issued another in connection with this election. For neither of these circulars did he obtain the leave prescribed by rule 45. Yet a third circular was issued by him, without due leave, in April, 1927, but he was not re-elected to the executive committee. In August of that year he stood for election as president, and upon request sent his election address to the executive committee

for approval. A short while later the general secretary told the executive committee of the plaintiff's issue of unapproved circulars, and the executive committee resolved that the plaintiff be penalized under rule 45, and that his nomination for president be disallowed; but this resolution was later withdrawn. The plaintiff's election address was not approved in its entirety by the executive committee, but he would not delete part of it as the executive committee demanded, and issued it without approval. A date was fixed at his convenience for the executive committee to deliberate and adjudicate upon the matter, and, if thought fit, to act under rule 45. He attended the meeting, and put forward his argument; and after his withdrawal, the executive committee resolved that he had infringed rule 45, and that he be expelled from the union accordingly. The plaintiff now sought a declaration that the resolution was ultra vires and void and an injunction to restrain the union from enforcing it.

The facts are fully set out in his Lordship's considered judgment.

C. A. Bennett K.C. and *E. J. C. Neep* for the plaintiff. The executive committee were at once accusers and judges. The plaintiff admitted distributing the circular. But the executive committee could not properly inquire into the merits or defects of that circular, as they were the objects of its attack: *Law* v. *Chartered Institute of Patent Agents.* (1) The decision in that case is exactly applicable to the facts in the present case. The resolution expelling the plaintiff from the union was ultra vires and void: his circular was bound to create bias in the minds of the executive committee which passed the resolution. Further, there was present at the time a gentleman purporting to be sitting as a member of the executive committee who in fact was not a member of it. The fact that the president and the general secretary of the union were not present at the actual submitting and passing of the resolution was not enough to guarantee that the other

(1) [1919] 2 Ch. 276.

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members of the executive committee were unbiased when they passed it. It had clearly been the intention all the time to expel the plaintiff from the union.

Sir Henry Slesser K.C. and *Howard Wright* for the union. There is a contractual basis for the jurisdiction under which the plaintiff was expelled from the union. Rule 45 constitutes a part of that basis, and it neither guides the executive committee in the exercise of their powers, nor fetters them in the exercise of their discretion. Under rule 45 the committee is in a quasi-judicial position: *Jackson* v. *Barry Ry. Co.* (1); *Ives and Barker* v. *Willans* (2); *Eckersley* v. *Mersey Docks and Harbour Board* (3); *Thompson* v. *British Medical Association (New South Wales Branch)* (4); *In re Fremington School. Ex parte Ward.* (5)

Bias could not be alleged against a tribunal such as the union unless the person alleging it could make out a case at the time of the hearing: *Leeds Corporation* v. *Ryder* (6); *Bignall* v. *Gale.* (7) Bias means something causing a leaning over from one side to another, and that something must be a consideration which is not proper: *Rex* v. *Sunderland Justices.* (8)

Bennett K.C. in reply. The questions to be decided are whether the executive committee were impartial, and whether a reasonable person, taking into consideration the relevant facts and circumstances, would come to the conclusion that they were. The plaintiff is entitled to an injunction in the terms of the statement of claim: *Allinson* v. *General Council of Medical Education and Registration* (9); *The Queen* v. *Allan* (10); *The Queen* v. *Meyer* (11); *The Queen* v. *Gaisford.* (12)

Cur. adv. vult.

MAUGHAM J. In this action the plaintiff, Mr. Neil Maclean, a member of Parliament for the Govan Division of Glasgow,

(1) [1893] 1 Ch. 238.
(2) [1894] 2 Ch. 478.
(3) [1894] 2 Q. B. 667.
(4) [1924] A. C. 764.
(5) (1847) 10 Jurist, 512.
(6) [1907] A. C. 420.
(7) (1841) 2 Man. & G. 830.
(8) [1901] 2 K. B. 357.
(9) [1894] 1 Q. B. 750, 758.
(10) (1864) 4 B. & S. 915.
(11) (1875) 1 Q. B. D. 173.
(12) [1892] 1 Q. B. 381.

claims against the Workers' Union, a registered trade union, whose office is at Golders Green in the county of London, a declaration that a resolution of the executive committee of the Workers' Union dated September 28, 1927, purporting to expel the plaintiff from the union, is ultra vires and void, and certain incidental relief. The defendants purported to pass the resolution in question under rule 45 of the rules in force at the relevant date, the rule being in these terms. [His Lordship read the rule and continued :] It will be observed that this rule is in two branches. Under the first part of it any member violating the rule must be fined 2*s.* 6*d.* and must be suspended from all benefits of the union till one month after the fine has been paid. So far there seems to be no option or discretion in the matter. The later words of the rule impose a discretion on the executive committee ; for it is only if the executive committee shall so decide that the member is to be excluded from membership of the union. Rule 45 is followed by another and more elaborate rule, No. 46, relating to exclusion of members on many grounds, and I understood it to be argued on behalf of the plaintiff that although rule 45 appears to be self-contained the reference in rule 46 (2.) to an offence specified in rule 45 shows that the two rules ought to be construed together. The drafting is somewhat defective ; for it would seem that if that had been the intention one would have found some reference to a breach of rule 45 in rule 46 (1.), which contains a long and elaborate list of grounds on which a member may be expelled by the executive committee from the union. Moreover rule 46 (7.) expressly refers to notice being given to a member of the intention to proceed against him " under this rule." On the whole, however, I think it will be safer and more consistent with what I should imagine to be the intention of the draftsman to hold that rule 45 should have effect in conjunction with rule 46 as far as possible, with the result amongst other things that the member charged with an offence under rule 45 has an express right to appear before the executive committee and conduct his case before them, and the further result that there is an appeal from the decision

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of the executive committee, as provided by rule 48; but, as will be seen, I do not think anything turns on the question.

This action arises out of a long existing series of disputes in relation to the management, control, and working of the defendant union, and having regard to the contentions on behalf of the plaintiff it is necessary to state the history of the case in some detail. The defendant union was established in the year 1898 and at all material times Mr. Charles Duncan was the general secretary and Mr. John Beard was the president of the trade union. The union has been and is managed by an executive committee and those permanent officers. The rules relating to the qualification and election of general officers and of the executive committee and for the government of the union are rules 23 and 24. There is a provision (rule 22) for a triennial conference of delegates of the union, which has important powers. The rules can be altered at the instance of the general executive by an appeal to members, or in the case of a general revision of rules by a rules revision committee (rule 49). The union is a large and important one, and consisted at the time when the present dispute arose of some 140,000 members. It is divided, for the purpose of representation on the executive committee, into eight divisions and no less than 1700 to 1800 branches situate in all parts of England, Scotland and Ireland. The members of the executive committee (together with the permanent officers) had of course important duties to perform, and were remunerated from time to time on the basis of being paid so much a day for their wages, so much a day for their expenses, and in addition third class railway fares. The number of days, however, included travelling time, so that, if there was (as was the custom) a two days' meeting, a Scotch member like the plaintiff was allowed three days' travelling time in addition to the two days, thus making five days' wages and expenses in all for such a meeting. The general secretary was a whole-time officer and was remunerated by salary. Questions arose as to whether the remuneration of the members of the executive committee was not too high. The plaintiff had been elected to the executive committee

as representative of a Scotch division in the year 1919 and took his seat as such at the beginning of 1920. He was twice re-elected. His remuneration was at first (like that of other members of the committee) on the basis of 15*s.* per day for wages and a like amount for expenses. The remuneration was subsequently raised, as a consequence of an informal amalgamation of the defendant union with two other trade unions, to 25*s.* a day for wages and 15*s.* a day for expenses. In the month of March, 1925, the necessity for economy had become manifest, and certain proposals were put forward by Mr. Beard and Mr. Duncan to reduce the scale of payments made in respect of expenses payable to the members of the executive committee. There was a good deal of difficulty about these proposals and the method of carrying economies into effect, and a strong antagonism seems to have developed between the plaintiff on the one side and Mr. Beard and Mr. Duncan on the other.

In June, 1925, a rules revision committee presided over by Mr. Beard was set up under rule 49 for the purpose of revising the rules. A sub-committee was appointed by that body in July of that year, and amongst other things that sub-committee passed a resolution to the effect that certain new and revised rates of remuneration payable to members of the executive committee should take effect by means of a standing order which should not be submitted to the members of the trade union for approval nor be printed in the rules. This resolution was objected to by the plaintiff. It was beyond the powers of the rules revision committee, and on this being pointed out the resolution was not further proceeded with. But the matter had occasioned a great deal of talk, and in August, 1925, the rules revision committee appointed a sub-committee "to be constituted with plenary powers to call for information upon all matters indicating that there was something wrong in the method of conducting the Workers' Union" and to report as to their findings as soon as possible. There ensued many discussions in regard to the remuneration which members of the executive committee were to receive, a matter on which feelings ran high, especially

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having regard to the fact that members of the committee came from different parts of Great Britain and were accordingly claiming to be paid sums which differed considerably as regards the number of days for which they were entitled to claim remuneration and expenses. It is sufficient to say here that the matter was ultimately settled by the rules revision committee, and that the new rule appears as rule 24, sub-rule 9 (*a*), of the present rules, which came into operation on April 12, 1926. In the meantime there had been charges made against the executive committee that they had been in receipt of remuneration at an exorbitant rate. The sub-committee had reported in favour of Mr. Beard and Mr. Duncan and of the steps they had taken in the matter. The triennial conference of the defendants, a conference of delegates of the union with eight representatives from each of the executive divisions, met in August, 1926. Its powers are stated in rule 22 (9.) in very general terms. On August 7 and 8, 1926, the conference proceeded to appoint four of its members, Mr. Cardinal, Mr. Lord, Mr. Coult, and Mr. Smith, to examine the books of the union as an investigation committee and to report as to their findings. The investigation committee proceeded to make certain findings as regards the remuneration which had been received by the members of the executive committee and the lay trustees, and stated that taking all things into consideration this remuneration was "largely in excess of anything that could be justified." There was an addendum report by Mr. Smith, Mr. Coult, and Mr. Lord in the following terms: "The undersigned members of the committee find that in their opinion the executive committee have misused the funds of the union. They accordingly recommend to the conference that (with the exception of Bros. C. Crowder and E. O'Neil to whom the foregoing remarks do not apply) the executive committee and lay trustees should be asked to resign from office forthwith and not be eligible for office for a period of ten years." On September 18, 1926, a resolution in the terms of the addendum report was adopted at the triennial conference, and on a card vote it was resolved

"that the conference records its strongest condemnation of the facts disclosed in the report" and further declared the opinion of the conference to be that the amounts drawn for expenses by the executive committee and the lay trustees during the period 1924 and 1925 were not justified. The investigation committee appears not to have called before it or heard any of the persons whose conduct was in fact attacked; and the plaintiff, not unnaturally, regarded their decision and statements as completely inaccurate and unfair.

The executive committee decided on January 3, 1927, to submit the substance of the decision of the investigation committee to a ballot of all the members of the union under rule 24 (3.) (*e*), a sub-rule which provides that the executive committee may take the opinion of the members or branches of the union upon any question that may arise. A ballot paper was accordingly prepared and sent out, which in effect asked the members whether the members of the committee were morally bound to resign and offer themselves for re-election. In connection with this ballot the plaintiff in January, 1927, issued a circular to the members of the defendants in Scotland in which he stated his view of the facts and defended the whole of his conduct in connection with the union. In this circular the plaintiff abstained from any attack upon Mr. Beard and Mr. Duncan; but he did not obtain any leave to issue the circular under rule 45. The ballot resulted in a decision against the members of the executive committee by a large majority; in other words, the members affirmed (in substance) the resolution of the investigation committee. The members of the executive committee accordingly resigned at once, and most of them, including the plaintiff, submitted themselves for re-election to their respective divisions.

In connection with this election the plaintiff at the end of February, 1927, issued another circular (again without leave) to the members of the division No. 6 which he had previously represented. In this circular he stated that for fifteen months he had been made the victim of attacks by the general secretary and president because of his attitude towards the

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proper administration of the union, and he also asserted that the struggle which had been taking place was "not a protest against excessive charges but a deliberate campaign to keep control of the union in the hands of a select few, two of whom are the greatest reactionaries any movement was ever cursed with." Mr. Lord was an opponent of the plaintiff in division No. 6 on this election. He appears to have circulated the whole of the report of the investigation committee as part of his election campaign against the plaintiff. At the beginning of April, 1927, the plaintiff circulated another circular addressed to the members of the Workers' Union defending himself and attacking in very strong language both Mr. Beard and Mr. Duncan. For this circular again the plaintiff got no consent under rule 45. Mr. Beard and Mr. Duncan replied by a circular issued from the chief office and dated April 23, in which they asserted (inter alia) that the whole of the matters contained in the circulars of the plaintiff had already been dealt with on three distinct occasions, first by a committee of the rules revision committee, secondly by an investigation set up by the triennial conference, and thirdly at a meeting composed of a number of representatives of district committees in London. They said further that on all three occasions the persons present decided against the plaintiff, and they added that by a large majority of ballot votes the members had confirmed these decisions. The plaintiff strongly attacks the truth of the statements contained in this circular, and he points out in particular that many of the matters complained of in his circulars had never been investigated at all and that the investigation committee never asked him to come before them and explain what had been done.

Mr. Beard attended various meetings of the constituents of the plaintiff and attacked the plaintiff. At some of those meetings the plaintiff was present and replied. As the final result the plaintiff was not re-elected; but Mr. Lord was elected for division No. 6.

In August, 1927, it became necessary to elect the general president of the defendant union, and the plaintiff determined

to stand for that office. As a preliminary he issued another circular without leave under rule 45, making and repeating the serious charges he had made in his previous circular as to the sums received by Mr. Beard and Mr. Duncan. He referred to their "malpractices," and stated that "faked figures" had been issued by Mr. Beard and Mr. Duncan, and he also commented upon the sums received for remuneration and expenses by Mr. Lord, who had beaten him in the recent election, but made no personal attack upon him. The postscriptum was in these terms: "I have been nominated for president, and it is my intention to stand in opposition to J. Beard as a challenge to his mismanagement of the union's affairs, his misuse of the union's resources, and his misrepresentations to the members of the true conditions within the union." On August 8 the general secretary informed the plaintiff that his nomination as a candidate for election to the office of general president had been accepted, and he was asked to forward a copy of his election address for the approval of the executive committee. On August 14 the plaintiff forwarded a draft of his election address, in which he made a number of statements, including a statement that "the last revision of the rules was largely a farce, and early developed into a contest between the officials of the union and the executive committee, owing to the attitude taken up by the present president and the general secretary. The work was scamped, due to an absurd ruling of the president on the first day, and after twelve or thirteen days had been spent on the framing of the rules, legal opinion taken on the recommendation of one of the trustees showed that the president's ruling was wrong, and the rules revision committee had to be recalled and start all over again." On August 16 and 17, 1927, however, the executive committee, which included Mr. Lord and Mr. Cardinal, received information from the secretary as regards the previous circular issued by the plaintiff without leave obtained. Discussion took place as to the action to be taken in the matter, and it was moved by Mr. Cardinal and duly seconded that the plaintiff be fined 2*s.* 6*d.* and suspended from all benefits of

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the union for one month after the fine has been paid in accordance with rule 45, and it was also resolved that his nomination for the general presidentship be not allowed to stand. It was further agreed that the plaintiff be notified "that if he issues any further circulars to the members of the Workers' Union without first obtaining the permission of the executive committee he will be excluded from membership of the union." This decision was conveyed to the plaintiff. It is clear that the resolution was ultra vires as regards the nomination of the plaintiff for the office of president. He at once, through his solicitors, threatened proceedings against the union and requested the committee to restore his name to the ballot paper forthwith. The defendants were advised by their solicitors that since the plaintiff had not been given the opportunity to attend and state his case the union's position was not a satisfactory one, and that the resolution of August 16 and 17 had better be rescinded, and the plaintiff's name restored to the ballot paper. This course was accordingly taken by the executive committee at a meeting held on August 30 and 31. On September 1, 1927, a notification was sent to the plaintiff that the executive committee had rescinded the resolution of which he complained and that the election of president would be proceeded with without reference to such resolution and as if the same had not been passed. I pause here to say that the plaintiff relies upon the fact that the resolution of August 16 and 17, 1927, had been passed by the executive committee and that they were compelled by threats of legal proceedings to rescind this resolution as having an important bearing upon what took place on September 29, when the resolution complained of in this action was passed. On the same day, August 31, the plaintiff's draft election address was considered and was approved subject to the omission of two passages, and the secretary forwarded to the plaintiff a letter stating that his election address in connection with his nomination for the office of president had been passed by the executive committee subject to two specified deletions. The first passage to be deleted included the statement I have quoted above from

the draft election address. The second passage in the view of the executive committee contained an inaccurate statement as to the expenses of the organizers in the year 1922.

On September 10, 1927, the plaintiff wrote to the secretary of the defendants as follows: "Sir, I have your favour of the 1st September re my election address and suggested deletions therefrom. I regret it is impossible to make these deletions for the reasons stated in the foreword to the address, a copy of which I enclose. I have, however, altered the figures in the paragraph which follows the second deletion suggested and a note showing the reason given by you when asking for the deletion and my reason for being unable to accede to it. I am sending a copy to each member of the executive committee."

The plaintiff accordingly sent out his election address with the addition of a "foreword" without the consent of the executive committee or the general secretary under rule 45; and at a meeting of the executive committee on September 13 and 14 it was agreed that the plaintiff should be informed that at their next meeting they proposed to consider the question of the publication of the election address in accordance with the provisions of rule 45.

On September 15, 1927, the secretary sent to the plaintiff a letter in the following terms: "Sir, Your letter of the 10th September and the printed circular (election address) which accompanied it were laid by me before the executive committee this day, together with communications from branches of the society which indicated that copies of such circular had been sent to them, notwithstanding that such circular had not been approved by the executive committee in accordance with rule 45 of the rules of the union. I was directed by the executive committee to inform you that this matter has been placed upon the agenda for the meeting of that body to be held at the above address on the 27th day of September, 1927, at 10 o'clock in the forenoon upon which occasion the executive committee propose to consider the question of the publication of the circular (election address) in accordance with the provisions of rule 45. Should they

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consider that the circumstances call for the same, the executive committee may exercise the powers conferred upon them by the said rule 45. I have to inform you that it will be open to you to attend at the said meeting and to conduct your case with reference to the complaint and upon such hearing to call any witnesses or submit any evidence you may desire in connection with the matter, and also to inform you that you should attend the said meeting, but that should you fail to attend the said meeting the executive committee may deal with the matter in your absence. I should be glad if you would please acknowledge the receipt of this letter." The plaintiff having by letter informed the general secretary that he would be unable to attend on September 27, the date of the meeting was altered to the 28th to suit his convenience. On September 28, 1927, the meeting of the executive committee took place. Mr. Beard and Mr. Duncan left the committee room when this matter came on and took no part in the discussion. Mr. Lord and Mr. Cardinal, however, remained. The plaintiff attended and admitted the issue and circulation by him of the election address, which had not been approved under rule 45. The plaintiff was invited to give an answer to the charge. He availed himself of this right by addressing the committee and putting to them the arguments which he desired to put forward as his answer to the charge. I have heard evidence as to what took place, and I am satisfied that the plaintiff took no objection to the constitution of the committee. After he had withdrawn, the committee considered the matter, and they passed the following resolution: "That the general executive committee, having heard Neil Maclean on the charges brought against him in a certain letter dated 15th September from the general secretary and he having admitted that he had on or about the 10th September, 1927, sent to the branches an election address or circular without having previously obtained the approval of the general executive committee or the general secretary thereto, and having heard all that Neil Maclean had to say in his defence, the executive committee came to the conclusion that Neil

Maclean had committed a serious breach of rule 45 and resolved that he be excluded from membership of this union."

Counsel for the plaintiff relied on three grounds in their attack on the validity of the resolution of September 28, 1927. First it is said that the executive committee in passing that resolution were prosecutors as well as judges or, with a slight difference of meaning, were judges in their own cause. Secondly, it is asserted that the members of the committee were so biased against the plaintiff as to be incapable of performing the quasi-judicial functions required of them under rule 45, or at all events that two of their number, Mr. Lord and Mr. Cardinal, were so biased; and that this would vitiate the decision of the body. Thirdly, it is suggested that one of the number of the executive committee, namely, Mr. Barnes, was not a duly elected member and must be regarded as a stranger who purported to act as a judge.

The third ground, in my view, is devoid of substance, and I will deal with it at once. Mr. Barnes was, I think, properly elected. It appears that his election was attacked by some members of the union on the ground that an advertisement had been published in a newspaper asking people to vote for Mr. Barnes. It was suggested that this was a breach of rule 45, and the executive committee fined him 2*s.* 6*d.* under rule 45 for breach of that rule. An appeal tribunal under the rules appears to have decided that the election of Mr. Barnes was null and void, because he had allowed the advertisement to be published. In my opinion, this was quite beyond the powers of the appeal tribunal. There is nothing in rule 45 which invalidates the election, although it is no doubt true that the executive committee if they thought fit might exclude from membership of the union a member who had committed a breach of that rule. It is therefore, I think, unnecessary further to consider this point.

The first and second grounds, however, raise questions of great importance. In a general sense it is, I think, true to say that the members of the executive committee in the circumstances of the case might fairly be suspected of a bias

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in a popular sense against the plaintiff, and it is a reasonable inference of fact that, having regard to the letter from the plaintiff of September 10, 1927, refusing to make the deletions in his election address for presidentship which the committee had required to be made and to the other facts which I have above mentioned, the committee in directing the letter of September 15, 1927, to be written to the plaintiff giving notice of their intention to consider the question of the publication by the plaintiff of the election address in accordance with the provisions of rule 45 were in effect taking upon themselves the duties of acting as prosecutors in relation to the charge of having committed the breach in question. These circumstances make it necessary to examine the law in relation to the conduct of such bodies as the executive committee. At the outset it may be expedient to point out that the question will not be whether the Court considers that the conduct of the defendants or their executive committee was fair and just; but the very different question whether the case is one in which the Court has power to interfere.

The jurisdiction of the Courts in regard to domestic tribunals—a phrase which may conveniently be used to include the committees or the councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or Royal Charter while acting in a quasi-judicial capacity—is clearly of a limited nature. Parenthetically I may observe that I am not confident that precisely the same principles will apply in all these cases; for it may be that a body entrusted with important duties by an Act of Parliament is not in the same position as, for example, the executive committee in the present case. Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the judge according to the evidence legally adduced and has a right to be represented by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of the witnesses and

the summing-up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges. Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearing, and there is no one even to warn them of the danger of acting on preconceived views.

It is apparent and it is well settled by authority that the decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence, since evidence in the proper sense there is none, and since the decisions of the tribunal are not open to any sort of appeal unless the rules provide for one. There is perhaps a question whether the decision can be attacked on the ground that there is no evidence (a word used presumably in a popular sense) upon which the tribunal could possibly come to such a conclusion. The question does not directly arise in the present case, but I may point out that the view of the Court of Appeal in *Leeson* v. *General Council of Medical Education and Registration* (1) seems to me to put the matter in a more accurate way than it is put in the subsequent case of *Allinson* v. *General Council of Medical Education and Registration*. (2) I accept with respect the views of Cotton and Bowen L.JJ. expressed in the first of these two cases as laying down the right principle. Bowen L.J. says in reference to *Leeson's* case: "There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the

(1) 43 Ch. D. 366, 378, 383. (2) [1894] 1 Q. B. 750.

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decision must be honestly arrived at if he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen these conditions have been fulfilled by the inquiry and by the tribunal which institutes it. The functions of the Court of law are at an end. It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to a right conclusion. If indeed it could be shewn that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew that the inquiry had not been a due inquiry; but if there is no blot of that kind upon the proceedings the jurisdiction of the domestic tribunal which has been clothed by the Legislature with the duty of discipline in respect of a great profession must be left untouched by Courts of law." To my mind that statement of the case mutatis mutandis is applicable, apart from any special rule, to all such cases as I am considering, and it follows exactly the same lines as the well known decision of the Court of Appeal in the case of *Dawkins* v. *Antrobus*. (1) On the other hand, for myself I am unable to attach any precise meaning to the phrase used by Lord Esher in *Allinson* v. *General Council of Medical Education and Registration* (2), from which it appears that he considered that the Court had to inquire into the question whether there was any evidence upon which the council could reasonably arrive at their finding; for I do not know how a Court of law is to weigh statements made not on oath and views formed it may be on hearsay allegations. I incline to the view that in *Allinson's* case the Court of Appeal, which professed to be following *Leeson's* case, did

(1) (1881) 17 Ch. D. 615. (2) [1894] 1 Q. B. 750, 757, 760.

not really intend to lay down a different doctrine on the point I am now considering.

It is certain, therefore, that a domestic tribunal is bound to act strictly according to its rules and is under an obligation to act honestly and in good faith. It is not suggested in the present case that the rules as they stand have not been complied with, and on the evidence before me I am quite unable to hold that the committee acted otherwise than honestly and in good faith. Indeed I was not invited to do so. It is, however, contended that there are other implied rules or implied obligations, sometimes described as obligations of natural justice, which the plaintiff may invoke; for example, a rule that no person or persons should sit on the tribunal or be present at the hearing if he or they are in effect prosecutors or if he or they may fairly be suspected of a bias against the accused. It is, therefore, desirable to consider the principle on which these contentions must ultimately rest.

In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association known as a trade union, it seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules. It is true that Lord Esher in *Allinson* v. *General Council of Medical Education and Registration* (1) appears to have invoked the principle of public policy. I need not consider whether that principle would be held at the present time to be properly applicable even in the case of a tribunal established by the Medical Act, 1858 (21 & 22 Vict. c. 90). In the case I have before me (and I may add in such a case as a power of expulsion in a members' club) it seems to me reasonably clear that the matter can only depend on contract express or implied. If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the Courts would interfere with

(1) [1894] 1 Q. B. 750.

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such a rule on the ground of public policy. Moreover, it is well settled by decisions of the Court of Appeal that, if the parties to a contract agree that a person who may well be suspected of a bias or who may be deciding in his own cause shall be the judge in a dispute between the parties, the Courts will not interfere : *Jackson* v. *Barry Ry. Co.* (1) ; *Eckersley* v. *Mersey Docks and Harbour Board.* (2) The position is one, as Davey L.J. remarked, in the latter case, at p. 673, which "prima facie raises some surprise in a judicial mind ; but," he adds, "that is the contract of the parties."

Eminent judges have at times used the phrase "the principles of natural justice." The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days, a person wronged executed his own justice. Amongst our own ancestors, down to the thirteenth century, manifest felony, such as that of a manslayer taken with his weapon, or a thief with the stolen goods, might be punished by summary execution without any form of trial. Again every student has heard of compurgation and of ordeal; and it is hardly necessary to observe that (for example) a system of ordeal by water in which sinking was the sign of innocence and floating the sign of guilt, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilization ; and even now the conception differs widely in countries usually described as civilized.

A person who joins an association governed by rules under which he may be expelled, e.g., such rules as in the present case exist in rules 45 and 46, has in my judgment no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith. It is impossible to doubt that, if the rules postulate an inquiry,

(1) [1893] 1 Ch. 238. (2) [1894] 2 Q. B. 667, 673.

the accused must be given a reasonable opportunity of being heard. The phrase, "the principles of natural justice," can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a *lis* between two persons, neither of them should sit on the tribunal. But when it is sought to lay down elaborate rules, taken from decisions as to Courts of law, and to apply them in such a case as the present, I think it is prudent to remember that these more or less artificial principles have no application except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it.

There are a large number of well known cases as to the disqualification of justices from adjudicating on matters in regard to which they are interested or where there is ground for a reasonable suspicion of bias: for example, *The Queen* v. *Allan* (1); *The Queen* v. *Rand* (2); *The Queen* v. *Gaisford* (3); *The King* v. *Sunderland Justices.* (4) The smallest pecuniary interest is a bar to the justice acting, and also a non-pecuniary interest of such a substantial nature as to make it probable that the justice had a bias. It is not easy to say what bias means in this context. Blackburn J. in the case of *The Queen* v. *Rand* (5) refers to the objection of bias as in the nature of "a challenge to the favour," a quaint phrase which was adopted and repeated by the Court of Appeal in *The King* v. *Sunderland Justices.* (4) Whatever may be the precise meaning of this phrase, I think that mere personal prejudice, even resulting from a previous dispute or altercation, is not comprehended within the term. In my opinion, however, these cases have no real application to the case of

(1) (1864) 4 B. & S. 915.
(2) (1866) L. R. 1 Q. B. 230, 231.
(3) [1892] 1 Q. B. 381.
(4) [1901] 2 K. B. 357.
(5) (1866) L. R. 1 Q. B. 230, 232.

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a domestic tribunal established by private contract and acting, as pointed out above, on a system and by methods so entirely different from those of a Court of justice. If we consider first the case of a pecuniary interest it is impossible in general to imply from the terms of the rules such a disqualification as regards the members of a domestic forum. For example, when members of a club expel another member under their rules, generally speaking, they all have a small pecuniary interest in the matter. Moreover the members of a domestic tribunal have other interests in the decision which may well render them something less than impartial. They have, for example, the interests of their association or body to protect, and may properly regard these interests as a matter of great importance. In many cases the tribunal is necessarily entrusted with the duty of appearing to act as prosecutors as well as that of judges; for there is no one else to prosecute. For example, in a case where a council is charged with the duty of considering the conduct of any member whose conduct is disgraceful and of expelling him if found guilty of such an offence, it constantly occurs that the matter is brought to the attention of the council by a report of legal proceedings in the press. The member is summoned to appear before the council. The council's duty is to cause him to appear and to explain his conduct. It may be said that in so acting the council are the prosecutors. In one sense they are; but if the regulations show that the council is bound to act as I have mentioned and to that extent to act as prosecutors, it seems to be clear that the council is not disqualified from taking the further steps which the rules require.

That some members of the tribunal may go out of their way to put themselves in a special position as prosecutors and thus to disable themselves from sitting in a quasi-judicial capacity at the inquiry cannot be denied. The case of *Law* v. *Chartered Institute of Patent Agents* (1) is a conspicuous example; but in order to understand the decision in that exceptional case it is necessary carefully to study the facts and especially to bear in mind that the council had in the

(1) [1919] 2 Ch. 276.

first instance applied to the Board of Trade to erase the plaintiff's name from the register and had plainly acted as accusers and prosecutors in the lengthy proceedings that ensued.

If an analogy from cases as to magistrates is required, I think one (though, of course, not an exact one) is to be found in the decision of the House of Lords in *Boyle or Walsh* v. *Wilson* (1), where it was held that magistrates forming a licensing court could before the hearing receive deputations of persons hostile to licences, rely on their personal knowledge of the facts, receive statements not on oath, and publicly declare their opinion that there were too many licensed houses in the district.

If I am right so far, the real and the only question that arises in this case is whether on the true construction of the rules any members of the executive committee were disqualified from acting in relation to the breach by the plaintiff of rule 45, that is, from imposing the penalty laid down in that rule if they thought fit. The plaintiff asked for leave to issue his election address in its original form, and treated with contempt the decision of the committee that it must be altered. It was then, I think, the duty of the committee to take the steps mentioned in the letter of September 15, 1927; and if in taking those steps they were prosecutors, the answer is that the rules in such a case contemplate that they should be. Nor do I think that the fact that on August 16 and 17 the committee had passed a resolution which was ultra vires and subsequently rescinded, affected their position on September 28, except so far as that circumstance might be evidence of bad faith, a matter on which I have already expressed my opinion. As regards Mr. Lord and Mr. Cardinal, they no doubt had in a sense ranged themselves, rightly or wrongly, in a camp friendly to Mr. Beard and Mr. Duncan and hostile to the paintiff; but in regard to the charge of a breach of rule 45, there was no *lis* between them and the plaintiff, and I am satisfied that there is no ground for contending that either of them was in any real sense acting

(1) [1907] A. C. 45.

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as a judge in his own cause on September 28. It may perhaps be true to say that the plaintiff had a long standing dispute with them as regards the management of the defendant union; but what follows from that? It is impossible to infer from the rules that members of the executive committee who do not see eye to eye with him on a matter of trade union politics are not to act. Even if there were satisfactory evidence (which there is not) that Mr. Lord or Mr. Cardinal had had a personal quarrel with the plaintiff, I should doubt very much whether it would be right to infer from the rules that he was thereby disqualified from acting under rule 45 or 46. That I think would be a matter of good taste, not of a legal disqualification. A case may well arise in which the member has definitely quarrelled with every member of the committee. Such bias as may result in the minds of the members of the committee, even if it were (which I greatly doubt) within the principle of "a challenge to the favour," cannot in my opinion constitute a disqualification from acting under rule 45.

The result is that the resolution in question is not open to objection in this Court. The action therefore fails and must be dismissed with costs.

I have carefully abstained from expressing any opinion of my own on the merits of the dispute between the plaintiff and Mr. Beard and Mr. Duncan; but to avoid a possible misconception I think it right to say that nothing in the case reflects on the honour of the plaintiff.

Solicitors for plaintiff: *T. J. Robinson & Son.*

Solicitors for defendant union: *Pattinson & Brewer.*

K. R. A. H.

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Feb. 21, 22, 25; March 12.

Vendor and Purchaser—Agreement for Sale of Land—Land identified in numbered Blocks—Model Forms of Conveyance for separate Blocks—Possession taken by Purchaser — Inappropriate Form with restrictive Covenants sent to Purchaser—Objection by Purchaser to Covenants—Notice by Vendor purporting to annul Agreement — Action by Purchaser for specific Performance — Missing material Term of Agreement—No enforceable Contract.

Where one or more of the material terms of an alleged contract cannot be determined, either by interpretation or as being of a kind which the law will supply, there is no contract, even though there has been an act of part performance, and the Court can grant neither specific performance nor damages.

The plaintiff signed an agreement, in the form of a letter prepared on behalf of the defendant, to purchase certain premises subject to the conditions endorsed thereon, and to take the conveyance "in the model form of conveyance specially prepared" for use in relation to the same. The conditions stated (inter alia) that the property sold was subject to restrictions appearing in the model form, and that if the purchaser should not after notice withdraw any objection which the vendor could not or would not remove, the vendor might by notice in writing annul the agreement. The premises were part of property conveyed to the defendant by three conveyances, among others, dated respectively 1908, 1910, and 1911. They were comprised in the 1908 conveyance, and were part of what was known in the defendant's agent's office as block 4, other parts of the property being there known as blocks with other numbers. Most of the property had come to the defendant subject to restrictions against user for trade purposes. At the date of the agreement the restrictions were obsolete in regard to blocks 4, 7, and 9: but in all dealings with property comprised in those blocks, the defendant had imposed like restrictions. No model form had been prepared for use in dealings with block 4: and through a mistake of the defendant's agent, the plaintiff received one appropriate to block 8. The plaintiff took possession before completion, and soon raised the question of turning the premises into a shop. After long negotiations, during which the question of restrictions was thoroughly discussed, the defendant refused permission, maintaining that, despite his agent's mistake in sending the wrong model form, the restrictions against trade ought to stand: and a new draft conveyance, incorporating such restrictions, was prepared on his behalf. The plaintiff refused to execute it, and sought by this action to enforce the original agreement subject only to restrictions in one of the schedules to the conveyance of 1908, and thus free from restrictions on trading:—

Held, that there was no enforceable contract, as, by reason of the non-existence of the appropriate model form of conveyance, there were missing from the original agreement material terms which the Court

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could not supply, and also that damages could therefore not be assessed.

Observations of Buckley L.J. on a passage in Fry on Specific Performance (*Waring & Gillow, Ld.* v. *Thompson* (1912) 29 T. L. R. 154) applied.

WITNESS ACTION.

The plaintiff, William Edward Stimson, entered into an agreement to purchase from Charles Gray, the defendant, freehold property and premises known as 116 Longbridge Road, Barking (hereinafter called "the premises"). The agreement consisted of a letter prepared on behalf of and addressed to the defendant, and signed by the plaintiff, and of an acceptance on behalf of the defendant. The letter was as follows:—

"The Faircross Estate,
Barking, Essex.

To Charles Gray, Esq.,
Stamford,
Lincolnshire.

Sir,

I agree to purchase for 900*l.* (in respect of which I have now paid a deposit of 50*l.*) the plot of land and house on your Faircross Estate mentioned in the margin subject to the conditions endorsed hereon. The purchase to be completed and the balance of the purchase money paid at your solicitor's office on the 15th day of December, 1924, when I am to have possession.

On completion I am to execute the deed of conveyance and a duplicate thereof, such deed to be in the model form which you have prepared for present use on that part of your estate which includes the above property."

[Name] William Edward Stimson.

[Address] "Granville," 34 Rancliffe Road, East Ham, E. 6.

Date 18/10/24.

"Note.—Mr. Gray will pay the tithe rentcharge (if it has not already been redeemed at the date of completion) and will pay all charges for making roads and footpaths so far as the same abut upon the above property prior to the same becoming repairable by the inhabitants at large; but Mr. Gray

will not enter into any covenant to the above effect. The land tax has been redeemed.

As to free conveyance, see conditions endorsed hereon.

On behalf of Charles Gray, Esq., I agree to the above, and acknowledge the receipt of the deposit of fifty pounds."

There were eight conditions endorsed on the agreement, and the second, third, and fourth were as follows :—

" 2. The property sold is subject to and will be conveyed subject to certain reservations, exceptions, restrictions, stipulations, and conditions, which appear in the model form of conveyance, and in the conveyance the purchaser is to enter into covenants binding him to observe and perform the said restrictions, stipulations, and conditions."

" 3. The title shall commence with a conveyance on sale dated the 1st December, 1911, made between Sir Edward Hamilton Westrow Hulse of the first part, Hamilton John Hulse and another of the second part, and the vendor of the third part."

" 4. If the purchaser shall make any objection or requisition as to the title, evidence of title, agreement, form of conveyance, or any of the aforesaid reservations, exceptions, restrictions, stipulations, or conditions, or the description of the property, which the vendor shall be unable or for any reason whatever unwilling to remove or comply with, the vendor shall be under no obligation to remove or comply with the same, and if the purchaser shall not withdraw the same within seven days after being required in writing so to do (time being of the essence of this clause), the vendor may, by notice in writing to be given to the purchaser, at any time annul the agreement for sale, returning the deposit to the purchaser, but the purchaser shall make no claim for interest, costs, or damages."

The premises were part of certain property which had been conveyed to the defendant by three conveyances, among others, dated respectively May 13, 1908, May 9, 1910, and December 1, 1911 ; and they were comprised in the first of these three conveyances. From the beginning of the transaction, the clerk to the Barking Urban District Council had acted as the plaintiff's solicitor, the council having agreed

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to advance a loan towards the purchase on condition that the premises be used only for residential purposes. Various portions of the defendant's property were known in his agent's office as blocks with different numbers, the premises being part of what was there known as block 4. Model forms of conveyance for use in relation to the defendant's property had been prepared, but did not include one for use in relation to block 4 and to the premises. A model form was supplied to the plaintiff which was, in fact, one intended for use in relation to block 8. On October 18, 1924—the date of the agreement—the defendant's solicitors were unaware that the building of houses was in progress on block 4, and were also unaware of the fact that houses built on that block required a form of conveyance different from that used in relation to other parts of the property. In the conveyance of May 13, 1908, were restrictions which allowed the building of private houses only. By the date of the agreement, however, those restrictions had long expired in relation to block 4, and the sending of the model form appropriate to block 8 to the plaintiff was a mistake on the part of the defendant's agent.

On December 10, 1924, the plaintiff took possession of the premises, having paid eight-ninths of the purchase price, the remainder of which was payable out of the urban district council's loan. The plaintiff shortly afterwards conceived the idea of turning the premises into a shop: and as he persisted despite the assurances of the defendant's agent that the terms of the conveyance would be contravened by his so doing, the urban district council withdrew wholly from the transaction, another solicitor acting thenceforth for the plaintiff. The defendant would not give leave to the plaintiff to convert the premises into a shop, and at last purported to annul the agreement by a notice in writing to the plaintiff under clause 4 thereof. In this action the plaintiff claimed specific performance of the agreement of October 18, 1924, a declaration as to the form in which the conveyance of the premises should be executed, and, in the alternative, damages and other relief.

The facts are fully stated in his Lordship's considered judgment.

E. M. Winterbotham for the plaintiff. The real question is whether the vendor is entitled to impose upon the sale certain restrictive covenants. He claims a right to rescind the contract. The contract is in the form of a letter to the defendant. Of the conditions on the back, No. 2 is important. It is alleged that he would never have entered into any contract save one which would give him power to prevent these houses from being turned into shops. If that was his real intention, he could clearly have said so. But he did not. The contention is based on the fact that up to the date of the contract he had never built anything but dwelling-houses on any part of his estate. In construing the contract, attention should first be directed to condition 2. That condition is in the form in which it is proper to give notice of existing restrictions, not of restrictions which it is intended to impose: see Key and Elphinstone, 12th ed., vol. i., p. 249. It is misleading to describe land by saying "the land 'is subject to'" when what is meant is that it is subject to a vendor's condition. The present is a vendor's condition, and not one arranged between the vendor and the purchaser. But even if it were, it would have to be construed against the vendor and in favour of the purchaser: *Rhodes* v. *Ibbetson*. (1) It is a general principle that if a vendor wishes to limit his legal obligation under a contract for sale, he must do so in a way which brings the limitation home to the purchaser. There is, in the present case, in fact no model form, and therefore the vendor is not entitled to limit his liability in any way.

Sir Thomas Hughes K.C. and *F. Baden Fuller* for the defendant. If the plaintiff cannot establish what the model form was, his case fails, and there is no contract. To decide otherwise would be forcing something entirely different from what either party intended. If a contract is incorporated in a document, that document must be clearly

(1) (1853) 4 De G. M. & G. 787.

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identifiable: *Hodges* v. *Horsfall* (1); *Price* v. *Griffith*. (2) There is not enough here to show what was the model form of conveyance, if, in fact, there was one at all. As to the notice to rescind, the relevant clause in the contract is clause 4. It is not too late to rescind until the matter is actually concluded: *Isaacs* v. *Towell*. (3) The contract, assuming that there is one, is one of which the Court ought not to decree specific performance, because to do so would work hardship on the defendant. If the vendor has entered into a contract into which he never intended to enter, the Court ought not to enforce specific performance: *Webster* v. *Cecil*. (4) This principle applies equally to the case of a purchaser: *Morrison* v. *Barrow*. (5) In that case there had been a mistake on the part of the vendor's agent: *Wycombe Ry. Co.* v. *Donnington Hospital*. (6) The present case is one in which the purchaser is seeking to enforce a contract which the vendor never intended. The vendor would be perfectly content with rescission. There is no contract; or, assuming that there is a contract, it was rescinded under condition 4.

Winterbotham in reply. It may be quite impossible to say what the contract is on the facts: *Hodges* v. *Horsfall* (1); *Price* v. *Griffith*. (2) In those two cases the absence of a plan made it quite impossible to say what the contract was. If parties contract on the basis of the existence of restrictions, the contract stands or falls according to whether it is agreed that it shall or shall not be subject to those restrictions: see Leake on Contracts, 7th ed., pp. 229, 230. If these parties have contracted that they will not be bound unless a model form is in existence, they are not bound: but if their contract merely refers to that form, and they have agreed to be bound whether it exists or not, they are bound. As to the independence of a contract of the real state of facts, see Leake, p. 233; see also Kerr on Fraud and Mistake, pp. 540, 542. If the parties intended to agree despite mistake of facts, the contract can still be valid. In the present case,

(1) (1829) 1 Russ. & M. 116.
(2) (1851) 1 De G. M. & G. 80.
(3) [1898] 2 Ch. 285.
(4) (1861) 30 Beav. 62.
(5) (1860) 1 De G. F. & J. 633.
(6) (1866) L. R. 1 Ch. 268.

it is quite obvious that the parties could not have made it an essential term of this contract that this model form should exist. As to the Court filling a gap left by the parties, see Fry on Specific Performance, para. 368. There is a very great difference between the case of a rent for a lease where the parties have not determined the length of the lease, and the case of an agreement where the parties have not determined the form of the conveyance. In the one case the Court will not fill the gap, in the other it will. The Court will do its utmost, in a case where there has been part performance, to give validity to what the parties intended as a contract. If the vendor lets the purchaser into possession and takes the purchase money after he realizes that there was a blunder, it is not open to him to say that he completed only on the footing that there was a model form of conveyance. The defendant, in view of his conduct, is not entitled to rescind: *In re Jackson and Haden's Contract.* (1) There has been, on his part, an element of shortcoming. He has omitted something which the ordinary prudent man, having regard to his contractual relations with other persons, was bound to do. He has told the purchaser that the restrictions which he wishes to impose are in a certain document, but he has not introduced them into the contract: *Quinion* v. *Horne.* (2) *Duddell* v. *Simpson* (3) was a case in which it was laid down that the vendor's ground for unwillingness must be reasonable. It must not be due simply to a desire to escape a difficulty which he has himself caused. [Reference was also made to *In re Hardman & Child.* (4)] Rights to rescind can be waived, and that principle applies to the present case. Possession has been given, and the purchase price paid. In September, 1925, there was a threat to rescind: but nothing was then done, and there was no rescission until May, 1926. On the form of this agreement, as well as upon the general principle of waiver, the Court should hold that this condition can be exercised only when the agreement is wholly

(1) [1906] 1 Ch. 412.
(2) [1906] 1 Ch. 596.
(3) (1866) L. R. 1 Eq. 578; L. R. 2 Ch. 102.
(4) (1885) 28 Ch. D. 712.

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unperformed. There is no satisfactory evidence that the vendor never intended to enter into this contract in this form. In *Morrison* v. *Barrow* (1) the judges thought that the verdict of a certain jury was wholly wrong. The case of *Wycombe Ry. Co.* v. *Donnington Hospital* (2) really turned upon s. 9 of the Lands Clauses Consolidation Act, and what is given in that case as a *semble* is wholly inconsistent with later decisions: *Powell* v. *Smith* (3); *Tamplin* v. *James.* (4) The Court will give no relief to persons who enter hastily into contracts without taking sufficient care to see the effect of what they are entering into. If a vendor, who was the only person who knew what he himself wanted to say, puts forward such a contract as this, he cannot be heard to say that it works a hardship on himself.

MAUGHAM J. In this action the plaintiff claims specific performance of an agreement in writing dated October 18, 1924, and made between the plaintiff and the defendant for the sale by the defendant to the plaintiff of a freehold plot of land and the house thereon known as No. 116 Longbridge Road, Barking, in the county of Essex, for the sum of 900*l.*, and a declaration as to the form in which the conveyance should be executed, or in the alternative damages and other relief. In this judgment I shall use the word "agreement" without prejudice to the question whether the agreement is such as to constitute in law a binding contract.

The document constituting the agreement is in a somewhat peculiar form. It consists of a typewritten letter already prepared on behalf of the defendant and addressed to the defendant, and intended to be—as in fact it was—signed by the plaintiff, and an acceptance on behalf of the defendant: and it is necessary in order to understand what follows, to state it in full. [His Lordship read the document and continued:] The conditions endorsed on or following the so-called agreement are eight in number, and the second, third, and fourth conditions, which are material to this

(1) 1 De G. F. & J. 633.
(2) L. R. 1 Ch. 268.
(3) (1872) L. R. 14 Eq. 85.
(4) (1880) 15 Ch. D. 215.

dispute, are in the following terms: [His Lordship read the conditions and continued:]

The defendant Mr. Gray is the owner of a considerable quantity of land in Barking which he bought for the purpose of development as a building estate. The land was conveyed to him by various conveyances, three of which are dated respectively May 13, 1908, May 9, 1910, and December 1, 1911. The land comprised in these three conveyances was purchased from the trustees of the Hulse Settled Estates. The house which the plaintiff intended to purchase—No. 116 Longbridge Road, described in the margin to the agreement—was part of the land comprised in the conveyance of May 13, 1908, and was portion of a block, roughly 130 feet square, to which the name of block No. 4 had been given in the office of Mr. John Ranson, the agent employed on behalf of the defendant. The block of land called block No. 7, also in Longbridge Road, and separated from block No. 4 by a road called Wilmington Gardens, was land included (inter alia) in the conveyance of May 9, 1910. Another block adjoining block No. 7 was (inter alia) comprised in the conveyance of December 1, 1911, and was described as block No. 9. Each of the three conveyances contained elaborate restrictions and conditions, including restrictions which permitted only the erection and user of private houses on the greater part of the property conveyed by such conveyances; but in each case the restrictions affecting blocks Nos. 4, 7, and 9 (being, as I have said, blocks fronting on Longbridge Road, which is a busy thoroughfare with trams running along it) permitted the conversion of houses erected thereon into shops, after dates therein mentioned which had expired long before the year 1924.

The position therefore in 1924 was that the great bulk of the land laid out by the defendant for building purposes was subject to restrictions imposed by the above conveyances which permitted only the erection of private houses, but the three pieces of land that I have mentioned—blocks numbered 4, 7, and 9—were, in the hands of Mr. Gray, freed from any

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such restrictions. The restrictions and conditions contained in the three conveyances mentioned are not the same, but vary in a number of details.

The defendant in laying out his property for building purposes has throughout employed Mr. John Ranson, a builder, as his agent, and has authorized him to effect sales of the houses when built at prices to be approved by the defendant. Certain forms of contract were from time to time prepared by Messrs. Taylor & Taylor, the solicitors for the defendant, and printed, lithographed, or typed for use by Mr. Ranson. All such printed or typed forms of contract were substantially in the same form as the agreement above set forth, save for the variations necessary by reason of the difference in the stipulation as to the commencement of title. Messrs. Taylor & Taylor had also prepared forms of conveyances which contained in a schedule a number of restrictions imposed or intended to be imposed by the vendor on the property thereby conveyed.

A very large number of houses had been erected on the defendant's property in Barking prior to the year 1924, and all of them (with the single exception of one public house) were conveyed to the purchaser subject to restrictions appearing in the model forms of conveyance, and therefore precluding the use of the property otherwise than for residential purposes. On block No. 4, and on some 40 feet of land adjoining block No. 4 and fronting on Longbridge Road, seven houses had been erected, including No. 116 Longbridge Road, the erection of which was just being completed when the agreement was made. Four of those houses had been conveyed to the respective purchasers, with restrictions against user for any purpose other than that of residential premises. On blocks No. 7 and No. 9 no houses had yet been built. On block No. 10, which was further down the Longbridge Road, and separated from block No. 9 by a road called Aldersley Gardens, four houses had been erected and had been conveyed subject to similar restrictions. It will be noted that far the greater part of the property held by the defendant was subject in his hands to restrictions of this character, and it was only as regards

blocks Nos. 4, 7, and 9 that the defendant was free to convey the property for shop purposes; but so far as he had dealt with these blocks he had subjected them to like restrictions as the rest of his land.

It was in these circumstances that Mr. Stimson, the plaintiff, signed the letter above stated, and that Mr. Ranson signed his name as agreeing to the purchase and acknowledging the receipt of the deposit of 50*l*. It will be observed that the conditions contain an obvious mistake. The title in condition 3 is alleged to begin with the conveyance on sale dated December 1, 1911. This was the conveyance which related to block No. 9. The conveyance relating to block No. 4 was dated May 13, 1908. Moreover, the portion of the document signed by the plaintiff states that on completion the plaintiff was to execute a deed of conveyance in the model form which the vendor had prepared for present use on that part of the estate. There were three model forms which had been prepared by Messrs. Taylor & Taylor as above mentioned. One related to block No. 8 only—which was a block adjoining block No. 9—and it contained restrictions on any trade or business being carried on upon the land, being restrictions to which the land was already subject under the conveyance from Sir Edward Hulse dated December 1, 1911. Two other forms were prepared for use in relation to blocks 1, 2, 3, 5, 6, and 8. No form had been prepared for use in regard to block No. 4. The matter derives importance from the circumstance that it is in the model form of conveyance that the reservations, exceptions, restrictions, stipulations, and conditions subject to which the land is to be conveyed are to be found (see the second condition above stated). The plaintiff was of course unaware of any difficulty in the matter. He was purchasing the premises, as he frankly admitted, in order to reside there with his wife, and he proposed to obtain a loan of 100*l*. from the Barking Town Urban District Council, which there was no difficulty in obtaining if the house was to be used for residential purposes. Accordingly, he employed Mr. Hargreaves, clerk to the council, to act for him in the matter, and put him in

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communication with Messrs. Taylor & Taylor, the solicitors for the defendant. On November 21, 1924, Messrs. Taylor & Taylor, replying to Mr. Hargreaves, who asked for the necessary abstract of title, enclosed the abstract of title, together with what was described as "a model form of conveyance for your use as arranged." The model form of conveyance so sent was the printed form prepared for block No. 8. It contained an habendum under which the purchaser would hold the property subject to a covenant binding the land contained in the conveyance of December 1, 1911, "whereby restrictions stipulations and conditions similar to those contained in the second schedule hereto were imposed upon the said land so far as the same are applicable to the land hereby conveyed and to any exceptions or reservations arising thereout or thereunder (all of which restrictions, stipulations and conditions exceptions and reservations are hereinafter included in the term 'the said restrictions')." The form contained a covenant by the purchaser with the vendor to observe and perform all and singular "the said restrictions"; and a number of restrictions, stipulations, and conditions were set out in the second schedule, including a provision that no trade or business should be carried on upon the said land. It is apparent that this form is really not applicable to the land included in the agreement of the plaintiff, and it is exceedingly difficult to say what the effect of a conveyance in that form would be, having regard to the reference to the conveyance of December 1, 1911, and to the words "so far as the same are applicable to the land hereby conveyed." On the other hand, it is clear that the form in question was not, to use the language of the agreement, a model form prepared for present use on that part of the defendant's estate which included No. 116 Longbridge Road. It may be fair to add that, at the time when the contract of the purchaser was entered into, Messrs. Taylor & Taylor were unaware that any houses were being built on block No. 4, and that special forms of contract and special model forms of conveyance were necessary. On the other hand, Mr. Ranson (who was a builder, without legal experience) was unaware that the

houses built on block No. 4 fronting Longbridge Road required a different form of contract to that which is applicable to other parts of the estate, nor, apparently, was he aware that block No. 4 had been conveyed by a conveyance dated May 13, 1908.

The completion of the purchase was arranged to stand over until the matter of a strip of land adjoining Longbridge Road, which it was intended to throw into the highway, was settled. The terms of this arrangement are contained in a letter of December 4, 1924, from Mr. Hargreaves to Messrs. Taylor & Taylor. Three conditions are mentioned as being agreed : (i.) that the title was accepted ; (ii.) that the council would advance to the purchaser the balance required to enable him to purchase the house, and (iii.) that any balance between the amount of the deposit and the council's loan and the purchase price should be paid to Mr. Gray's agent, upon which the purchaser should be let into possession. On December 10 the amount agreed to be advanced by the council in respect of No. 116 Longbridge Road was formally agreed at 100*l.*, being the balance of the sum payable in respect of the house. On the previous day, December 9, the plaintiff paid 750*l.* to the defendant's agent, and he was thereupon let into possession of the property. He has remained in possession ever since.

As I have already said, the plaintiff entered into the agreement with a view to residing in the house ; but not long after he and his wife had gone into possession, it seems to have occurred to his wife that the position was one in which a shop might be a profitable undertaking. She mentioned the matter both to Mr. Hargreaves and to Mr. Ranson, and both these gentlemen told her the premises could not be turned into a shop. I think the plaintiff is mistaken in thinking that Mr. Ranson at one time told him that the house could be turned into a shop by getting the sanction of the neighbours, but nothing turns upon this. In the meantime, the question of the widening of the road had been settled, and the form of the conveyance had come under consideration. There remained only the balance of 100*l.* to be paid in respect of the purchase

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price. The plaintiff, however, by June, 1925, had determined to endeavour to convert the house into a shop if he could lawfully do so, and he so informed Mr. Hargreaves. This gentleman, having ascertained that the defendant's solicitors strongly objected on behalf of the defendant to such a proposal, by a letter of June 3, 1925, to the plaintiff informed him of this fact, and stated that, as litigation might ensue, and as he (Mr. Hargreaves) was only allowed to act in connection with the purchase of property when advances were made by the council, he was returning the form of contract and the abstract of title in order that the plaintiff might take what action he desired in the matter. It should be added that advances were made by the council only in relation to residential property, and that the plaintiff, by this time, was prepared to do without the loan of 100*l*. He had decided to convert the house into a shop—namely, that of a confectioner and tobacconist. As from June 5, he employed a fresh solicitor, who obtained in due course a draft conveyance of the property, which disclosed the defendant's view of the necessary restrictions. A correspondence ensued in regard to the question whether, according to the terms of the agreement, the draft conveyance should contain (inter alia) a restriction against using the premises for business purposes. On July 1, 1925, the plaintiff applied to the defendant direct for permission to make the proposed alterations, but this permission was refused. After a somewhat prolonged correspondence and a notice dated September 10, 1925, to the effect that if the plaintiff refused to agree the draft conveyance as revised on behalf of the defendant, the defendant would have no alternative but to serve the plaintiff with notice under clause 4 of the contract annulling the contract, a vendor and purchaser summons was issued by the plaintiff on November 11, 1925, asking for a declaration that the plaintiff was entitled to a conveyance subject only to the restrictive covenants contained in the second schedule to the indenture dated May 13, 1908, above referred to, or such of the same as were still subsisting and capable of taking effect. The result of such a declaration would be that the plaintiff would become entitled to a

conveyance free from the restriction precluding any trade or business being carried on upon the premises. The summons came before the Court; but the learned judge came to the conclusion that the matter was one for an action, and the summons accordingly stood over generally; and on October 7, 1926, the present writ was issued in this action.

As I have already said, the plaintiff claims specific performance of the agreement. He contends, also, that the conveyance ought to be in the form claimed in the vendor and purchaser summons, and alternatively he claims damages. The defendant by his defence pleads that if the plaintiff entered into the agreement in the belief that the property was subject only to the restrictions in the conveyance of May 13, 1908, no agreement was ever concluded between the plaintiff and the defendant. He also claims that the plaintiff is bound to take the conveyance subject to the restrictions, stipulations, and conditions which the defendant has imposed upon all parts of his estate, and which appear in the various model forms above referred to. Further, he contends that, by notice in writing dated May 3, 1926 (some six months after action), when the plaintiff was insisting by the action on his objection to the form of conveyance proposed, the defendant gave notice to the plaintiff that unless his objection was withdrawn within seven days from the receipt of the notice the defendant annulled the agreement. Lastly, the defendant contends that if the plaintiff is entitled to have a conveyance in the form he claims the agreement was entered into by the defendant in mistake, and that the performance thereof will be detrimental to the remaining property of the defendant and a hardship to him, and, accordingly, that the Court ought not to grant specific performance.

The first question that arises is whether there is a completed contract. It seems to me impossible for the Court properly to answer this question in the affirmative, unless it is also prepared to state, or at least to ascertain, the whole of the terms which are binding on the parties. In a case in which there has been part performance and a long enjoyment of

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possession, it is easy to understand that the Court is unwilling to entertain the view that the contract is incomplete: Fry on Specific Performance, 6th ed., p. 155, § 335. On the other hand, if the Court is unable to determine all the material terms of the alleged contract, either by interpretation of the language used, or by holding that the missing details are such as the law will supply, I do not think it is possible to say that there is a binding contract. In the present case, with every wish to assist the plaintiff, I cannot escape from the conclusion that the reservations, exceptions, restrictions, stipulations, and conditions referred to in condition 2 are material terms of the agreement which cannot be supplied by mere interpretation. It has been forcibly urged on the plaintiff's behalf that if a model form of conveyance referred to in an agreement does not exist, the law will supply that defect, and I think there is in general much weight in that contention. It is also urged that the form of condition 2 suggests that no fresh restrictions will be imposed by the vendor, and that the condition points to the conclusion that the vendor is merely giving notice of existing restrictions and requiring the purchaser to enter into an express covenant with the vendor to observe and perform them. But the agreement and the conditions must be construed together. In my view, the reference to the model form of conveyance in the body of the agreement and in condition 2, and the reference to the restrictions both in condition 2 and in condition 4, preclude me from holding that by the contract the conveyance is to be made subject only to existing restrictions. It is to be noted that in condition 3 the conveyance to the vendor which was supposed to be the root of title is referred to. If by condition 2 it had been intended that the property was to be sold subject only to the conditions contained in that conveyance, it would have been very easy to say so. Moreover, the repetition of the words "subject to" in condition 2 seems to me to support the view that the conveyance will be made subject to restrictions which will be found only in the model form, and which need not be confined to restrictions mentioned in the deed of December 1,

1911. Nor does it seem probable, if the plaintiff's contention is right, that condition 4 would have referred (contrary to the usual practice) to reservations, exceptions, and restrictions, because, on that hypothesis, the purchaser would have had no right to make any requisition as to any such restriction. On the whole, therefore, I come to the conclusion that there is a material term of the agreement which cannot be supplied by the Court, and that there is no concluded contract capable of being specifically enforced. In coming to this conclusion, I have not left out of account the consideration that the form of the agreement is based on a mistake as to the facts, and the circumstance that condition 3 is wholly inapplicable to a piece of land forming part of lot No. 4.

If specific performance is impossible, because the Court is unable to determine the form the conveyance should take, is the plaintiff nevertheless entitled to damages? It is true that, in a well known passage in Sir Edward Fry's work (Specific Performance, 6th ed., p. 179, § 380) the learned author states that "it is obvious that an amount of certainty must be required in proceedings for the specific performance of a contract greater than that demanded in an action for damages. For to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed." I am, however, unable to see any answer to the comment of Lord Wrenbury (then Buckley L.J.) in *Waring & Gillow, Ld.* v. *Thompson* (1) on that passage. In my opinion, following

(1) 29 T. L. R. 154, at p. 155: "In a certain but very limited sense the proposition was true. There were some agreements as to rights to be enjoyed in which there was no question as to what the right was whose enjoyment was the subject of the contract, but in which the mode of enjoyment had not been so identified as that the Court would order specific performance"; and at p. 156: "If this passage" (i.e., in Fry) "was to be understood as meaning that for the purpose of an action for damages a conclusion could be reached that the defendant had not performed his contract when the Court had not determined

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those remarks, if the Court, as here, is unable to determine what the material terms of the contract are, it is equally unable to say that there is a contract in relation to which damages can be assessed. The present case, indeed, is not a bad illustration of the difficulties which would arise from a contrary view. It is necessary to observe that the defendant is not refusing to convey the premises to the plaintiff. By his defence and at the Bar he offered a conveyance subject to the restrictions which appear in the various model forms which I have above referred to, which he has made to apply to (practically) all the lots he has hitherto sold; and that offer is still, I understand, open. In these circumstances the Court must determine the question what is the contract which is to be performed before damages for breach could be assessed; but since, for the reasons given, that question cannot be answered, the conclusion must be that there is no contract.

Something might perhaps have been urged in favour of the view that, the defendant's solicitors having forwarded on November 21, 1924, what they stated to be the "model form of conveyance for your use," the plaintiff was entitled to a conveyance in that form. The model form sent was, however, not really applicable, since it related to block No. 8, and, as I have stated above, it was not in fact the model form prepared for present use for block No. 4. No estoppel was set up by the plaintiff, and the defence does not deal with that point. Nor do I understand the plaintiff's counsel to desire a course to be taken which would almost certainly lead to further litigation.

The action therefore fails, and it is unnecessary for me to consider the other questions of considerable difficulty which would have arisen if the agreement were held to be a binding contract, or to deal with the evidence which was called in

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what the terms of the contract were, his Lordship could not agree with it. It was impossible that the Court should say, 'I do not know what you have contracted to do, but I can estimate the damages sustained by your not doing it, and you shall pay damages for not doing it.' The passage must be understood, his Lordship thought, in the limited sense which he had sought to state."

relation to those questions. There remains only the matter of costs. I have to bear in mind that the error which has led to the inconclusive result is entirely on the part of the defendant, and that the plaintiff was a layman, not blessed with ample means, and acting without professional advice, before whom the defendant's agent was placing an unusual form of agreement, and to whom he was offering the advantages of a free conveyance if the vendor's title was accepted without investigation. On the whole, I am satisfied that in dismissing the action I ought to dismiss it without costs, and I think the costs of the vendor and purchaser summons should follow the same course.

Solicitors for the plaintiff: *Headley, Dalzell & Dickinson.*
Solicitors for the defendant: *Taylor & Taylor.*

K. R. A. H.

In re WALTER (DECEASED).

SLOCOCK *v.* OFFICIAL RECEIVER AND OTHERS.

[1928. W. 784.]

Bankruptcy—Earnings of Bankrupt after Adjudication—Death—Money left in Bank representing Savings of Bankrupt—Funeral Expenses paid by Executor—Creditors' Claims for Debts since Adjudication—Necessaries—Personal Savings—Executor's Claim for Recoupment—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 38, 130, *sub-s.* 6.

A., having made his will, was adjudicated a bankrupt, the claims remaining unsatisfied exceeding his estate. After the adjudication the bankrupt out of his personal earnings accumulated certain sums, which he placed in a bank. The bankrupt, during the period that he was accumulating these sums, incurred further debts to creditors in the ordinary course of living. On his death, the creditors whose claims had arisen since the bankrupt's adjudication, claimed that they should be paid out of the accumulations which the bankrupt left at his death before the Official Receiver, as the trustee in bankruptcy, took anything.

The bankrupt's executor also claimed that the funeral expenses, which he had been obliged to pay on the bankrupt's death, should also be repaid in full out of the accumulations:—

Held, first, that the death of the bankrupt made no difference as to creditors' rights; and that such debts of the creditors as had arisen since the adjudication, and as, after inquiry, should prove to be

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necessaries remaining unpaid, were properly payable out of the accumulations left by the bankrupt at his death; and secondly, that the reasonable funeral expenses incurred by the executor on the death of the bankrupt were also properly payable out of the accumulations.

ORIGINATING SUMMONS.

By his will dated November 8, 1926, Francis H. Walter (hereinafter called "the testator"), after appointing the plaintiff and another, executors and trustees thereof, gave devised and bequeathed all his real and personal estate whatsoever and wheresoever to his trustees upon trust for sale and conversion, and out of the proceeds of such sale and conversion to pay his funeral and testamentary expenses and debts, and declared that his trustees should stand possessed of the net residue of the proceeds of his real and personal estate in trust for all his children as therein mentioned.

The testator died on June 15, 1927, leaving three children surviving him, and probate was granted on October 7, 1927, to the plaintiff alone as the surviving executor, out of the Principal Probate Registry. The estate was sworn at 651*l.* 19*s.* 6*d.*, but 656*l.* 14*s.* was actually collected. At the date of his death, the testator was an undischarged bankrupt, having been adjudicated bankrupt on March 16, 1925, and the claims under the bankruptcy remaining unsatisfied exceeded the amount of his estate.

In October, 1926, it appeared that the testator had entered into an agreement with a rubber company to proceed to South America as their representative at a salary of 700*l.* per annum and expenses. Prior to his departure, divorce proceedings had been begun by the testator's wife, which were undefended, and she obtained a decree nisi on April 12, 1927. The testator returned from South America in May, 1927, and died as above stated on June 15, 1927, in furnished lodgings in London. As it was essential that the funeral should not be delayed, the plaintiff paid the expenses connected therewith, amounting to 80*l.* 2*s.* 6*d.* Certain creditors of the testator—some of whom were unaware of the bankruptcy—had supplied the testator, subsequent to his bankruptcy,

with goods and necessaries and rendered professional services, and there was also a claim by the wife in respect of the divorce proceedings. These were defendants to the summons, and they claimed that they should be paid out of the estate left by the testator. Claims therefore for debts incurred since the date of the receiving order, amounting to 306*l.* 18*s.* 8*d.*, were sent in to the plaintiff as the executor, together with a claim for the costs incurred in the divorce proceedings, which amounted to 66*l.* 4*s.* 9*d.* None of the debts were trading debts, but had been incurred by the testator in the ordinary course of living. It appeared that the estate left by the testator at his death, probably represented savings accumulated by him while in South America since the date of the receiving order, and paid by him into his banking account.

An originating summons was accordingly taken out by agreement between the plaintiff and the Official Receiver, for the determination (inter alia) of the following questions: (1.) Whether the whole or any of the bankrupt's estate acquired by him subsequent to his adjudication as a bankrupt was payable to the Official Receiver as his trustee in bankruptcy; (2.) Whether the funeral expenses of the bankrupt were payable out of his estate acquired by him subsequent to his adjudication as a bankrupt. The other questions related to the claims of the creditors for goods supplied and services rendered subsequent to the bankrupt's adjudication as a bankrupt, and the costs incurred in the divorce proceedings. These creditors were—as well as the Official Receiver—made defendants to the summons.

J. J. Llewellin for the plaintiff, surviving executor of the will. It is submitted that the executor is entitled to recover this sum paid for the deceased bankrupt's funeral expenses out of the estate which he left at his death. It is part of the duty of an executor to pay the funeral expenses: see *Sharp* v. *Lush.* (1) But his exact position in this respect has never really been determined.

(1) (1879) 10 Ch. D. 468, 472.

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It is the duty of the Official Receiver of course to consider all creditors so far as he can, but it is submitted that he should not in a case such as this insist on his strict powers, nor ought the Court to deprive the plaintiff of his right to recover this sum: see *In re Thellusson.* (1) It is submitted that the Court ought not to assist the Official Receiver; the executor clearly only did his duty and should not suffer a pecuniary loss.

F. D. Morton for the Official Receiver, the trustee in bankruptcy. The Official Receiver is entitled to the sums earned by the bankrupt.

[TOMLIN J. It may be that the estate should be administered in bankruptcy.]

In such a case the trustee in bankruptcy ranks as a creditor: see s. 3 of the Bankruptcy (Amendment) Act, 1926, replacing s. 39 of the Act of 1914.

[*G. H. Beyfus* for the creditors. It is submitted that no transfer should be made to the bankruptcy court; the contention of the Official Receiver is not well founded.]

These savings of the bankrupt are undoubtedly part of the property which should pass to his trustee in bankruptcy: *In re Roberts.* (2)

G. H. Beyfus for the creditors since the bankrupt's adjudication. These are personal earnings of the bankrupt and are not divisible among the general creditors, nor pass to the trustee: *Chippendall* v. *Tomlinson* (3); *Williams* v. *Chambers* (4); and compare *Wadling* v. *Oliphant.* (5) This case is distinguishable from *In re Roberts* (2); here they are the deceased bankrupt's personal earnings. The whole object of the bankruptcy laws is to give the bankrupt a fresh start in life after he has satisfied his creditors. The death of the bankrupt does not alter the position, the money standing to his credit in the bank represented necessaries. These creditors, it is submitted, could be recouped the money from the trustee: *Ex parte James* (6); and as to a mistake

(1) [1919] 2 K. B. 735, 745.
(2) [1900] 1 Q. B. 122.
(3) (1785) 4 Doug. 318, 321.
(4) (1847) 10 Q. B. 337.
(5) (1875) 1 Q. B. D. 145.
(6) (1874) L. R. 9 Ch. 609.

in law as to payment of money see *In re Brown.* (1) If he was living, the bankrupt could have retained the money. This surplus remains the bankrupt's property until the trustee comes to the Court to recover it. It is for the Court to say what the surplus is; it is really a question of principle.

F. D. Morton in reply. Undoubtedly the money in the bank standing to the credit of the bankrupt at his death passes to the trustee in bankruptcy: see s. 38 of the Act of 1914. The fact that these debts were incurred since the adjudication does not affect the position at all, now the bankrupt has died. In *In re Roberts* (2) Lindley M.R. in his judgment refers to what may be necessaries, and says: "On the other hand, the necessity is the limit of the exception." It is submitted that the Court should take a strict view of the exception placed on the statute by the cases. As to "personal earnings" see *Affleck* v. *Hammond.* (3)

J. J. Llewellin in reply.

TOMLIN J. This is a summons taken out by the personal representative of a deceased bankrupt against the Official Receiver (the trustee in bankruptcy) and certain persons who claim to be creditors of the deceased in respect of debts incurred by the deceased between the date of the adjudication and the date of his death. The questions which I have to determine are these: The assets of the estate in the hands of the executor consist exclusively of unexpended personal earnings of the bankrupt; that is to say, they are the surplus of his salary over what he actually spent, he having been occupied in some commercial situation, and I am asked by the plaintiff and by the defendants, other than the Official Receiver, to say that there is properly payable out of the estate, before the Official Receiver, as the trustee in the bankruptcy, takes anything, the funeral expenses of the deceased (which funeral expenses have actually been paid by the executor), and the debts in question. The actual fund is some 655*l.*, the amount of the debts about 300*l.*, and

(1) (1886) 32 Ch. D. 597, 602. (2) [1900] 1 Q. B. 122, 128.
(3) [1912] 3 K. B. 162, 172.

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the funeral expenses are 80*l.*, or thereabouts. The adjudication was on March 16, 1925, and the bankrupt was undischarged at the date of his death.

It is said on behalf of the Official Receiver that the Bankruptcy Act, 1914, s. 38, under which the property of the bankrupt divisible amongst his creditors is satisfied, includes after acquired property, such as salaries earned after the adjudication, and that, although it is true—and, I think this is admitted by the Official Receiver—that as regards personal earnings, he would be permitted to spend what was necessary to keep himself and his wife and children alive and reasonably clothed and maintained, that is in the nature of a personal privilege. If it happens that he dies before those who have supplied the necessary commodities have been paid, that is an advantage to the creditors in the bankruptcy, because those suppliers of goods, not having been paid, could not possibly be paid, the debtor being no longer present to exercise that personal privilege of buying necessities; and that therefore, the fund out of which they would have been paid goes intact to the trustee in bankruptcy, and the creditors who supplied the necessary goods go unpaid.

On the other hand it is said that the principle is that the courts have always recognized that there is some limitation on the vesting provision in the Bankruptcy Act, 1914, and it is this, that in regard to personal earnings there vests in the trustee, only the surplus over and above what is required for the maintenance and that, so far from the paying for commodities which are necessary for maintenance being a personal privilege of the debtor, it is a right which the debtor has; and if by chance the creditor who supplied the commodities is unpaid at the date of death, then he ought to be paid out of the fund from which the debtor in his lifetime would have been entitled to pay him.

Now I think it is reasonably plain that there is a limitation upon the vesting under the Act, and I do not know that I need do more than read a passage from Lindley M.R.'s judgment in *In re Roberts* (1), where he says: "The present

(1) [1900] 1 Q. B. 122, 128.

Act "—that I suppose is the Act of 1883—"like previous Bankruptcy Acts, must be construed so as to enable him to do so "—that is, live to use his tools and so on—"and the language of s. 44 "—that is the corresponding section in the Act of 1883 to s. 38 of the Act of 1914—"clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception." Now I propose, until I am corrected, to take that as the measure of the bankrupt's right; that is, to say that the section does not deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live; in other words it is only the surplus over and above that which vests in the trustee.

That being so it seems to me that the trustee, if the bankrupt was alive, could not claim anything more than that which was over after the bankrupt had provided for what was reasonably necessary, having regard to his occupation and station. The question is whether it makes any difference that, before he has paid the bills, he dies. For my part I am wholly unable to see upon what principle, either of logic or honesty, it can make any difference. It is to be observed that so far as the creditors in the bankruptcy are concerned, and also the trustee in the bankruptcy, they profit by the exertions of the bankrupt, inasmuch as the surplus of the personal earnings passes to them, and it is in part by means of the expenditure on necessaries that that surplus is capable of being earned. It seems to me to be not in accordance either with logic or sound principle to say that, if the debtor happens to die before the bills for those commodities are paid, the trustee, who is still getting the profit which results from the bankrupt's exertions, is free from the obligation of seeing that, so to speak, the fuel by which the fire has been stoked is paid for. In fact, whether the bankrupt lives or dies, if the things were proper for him to buy, they are, in my opinion, things which ought to be paid for before the trustee takes anything.

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That being so, so far as those debts are concerned, it appears to me to depend upon whether they are in fact necessaries within the meaning of the rule. I have not the material before me to enable me to express an opinion about that, and all I can do is to make a declaration to the effect that debts representing necessaries unpaid for, are proper to be paid out of the fund, and direct an inquiry as to what debts there are of that character.

That leaves the other point, as to the funeral expenses. Now it is said that the funeral expenses may be distinguished from the necessaries in two ways: first, that a man's funeral is no part of that necessary equipment which enables him to live; and secondly, that it is not part of that expenditure that results in the earning of the profits which enure to the benefit of the trustee; and that, therefore, they ought not to be paid. That is true, but I am not sure that they do not come under a somewhat different principle, under the head of things that ought to be paid. The legislature itself has recognized, at any rate, that funeral expenses are an expense that ought to be provided for in full before the debts are paid, because I find in s. 130, the section under which, after the death of a debtor, a bankruptcy petition may be presented and an order for administration of the estate of the deceased debtor made in bankruptcy, this sub-s. 6: "In the administration of the property of the deceased debtor under an order of administration, the trustee shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and shall, notwithstanding anything to the contrary in the provisions of this Act relating to the propriety of other debts, be payable in full, out of the debtor's estate, in priority to all other debts." It seems to be a little curious if there is this distinction, that where the bankruptcy adjudication is made before a man dies, his funeral expenses are not to be paid out of his estate, but if it is made after he dies, they are to be paid out of his estate. It is true that

there is no provision which deals with the particular state of facts which obtain in this case, but it appears, and has been said, that it is the duty of the executor to bury his testator, and that he is liable to pay for his funeral, whether he has assets or not. That is to say, the executor has thrust upon him, if that be true, something in the nature of a public duty of an onerous kind, and I think it would be a course which I should not take unless I were driven to it, to hold that an executor who has duly buried his testator and paid for the funeral, is not entitled to be paid in full for the proper costs of the funeral out of the assets before handing the balance over to the trustee in bankruptcy. I think whether it be by analogy to what is recognized in s. 130, or whether it be upon the general principle that the position of the executor is such that common justice demands that he should be indemnified out of the assets, for doing his public duty, it is proper to hold that these expenses are payable out of the estate before the balance is handed to the Official Receiver.

Of course, in a matter of that kind, there must be a question of amount. It is not enough to say that the executor is entitled to be paid the expenses of the funeral. Obviously they must be expenses which are reasonable, having regard to the position of the deceased; and the Official Receiver, I think, is entitled to an inquiry, if he desires it, as to what is a reasonable sum to allow the executor in respect of the item. I understand, however, that the Official Receiver will not contest the amount expended by the executor, and therefore there will be a declaration that the executor is entitled to retain that amount out of the assets, and to pay any debts of the bankrupt representing liabilities incurred for necessaries for himself, his wife and children remaining unpaid at his death.

Solicitors: *Herbert Reeves & Co.*; *Tarry, Sherlock & King.*

A. R. T.

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Feb. 6, 7, 27.

PONTARDAWE RURAL DISTRICT COUNCIL *v.* MOORE-GWYN.

[1928. R. 397.]

Nuisance—Rocks at Summit of steep Slope—Fall of Rock causing Damage to Plaintiff's Premises—Natural Decay and Weathering—Ordinary User of Land in natural State—Owner not liable for Damage resulting from Fall—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 91, 94.

The owner of land on which there is an outcrop of rock overhanging a steep slope is not liable for damage caused by reason of portions of that rock breaking away and falling down the slope if the break is due to natural causes, such as weathering, and the owner has used his land in an ordinary way, without any mining or quarrying operations.

Rocks in such a position, though they may become dangerous, are not "premises in such a state as to be a nuisance" within s. 91 of the Public Health Act, 1875.

Special Case.

The plaintiffs brought this action claiming relief in respect of the condition of certain rocks on land known as the Duffryn Estate, Pontardawe, Glamorgan, of which the defendant was tenant for life. The plaintiffs contended that the rocks, being liable to break away and fall, were dangerous, and were therefore "premises in such a state as to be a nuisance" within s. 91 of the Public Health Act, 1875, and alternatively that their condition was such as to cause a common law nuisance to the plaintiff Jenkins, and that the defendant was bound to take such precautions and execute such works as would render the rocks safe against any further fall.

The parties concurred in stating the questions of law arising in a special case for the opinion of the Court.

The rocks, as shown by the agreed plans, extended along the summit of a bluff or steep incline facing in a north-west direction above the valley in which Pontardawe is situate. They were 518 feet above sea level and about 245 feet above the nearest houses below, the gradient of the slope averaging 1 in 2. In July, 1925, the plaintiff council called the attention of the defendant to the dangerous state of the rocks, and

he then erected a fence along the south-east side of the rocks in order to prevent trespassers from approaching the rocks from the top. On January 8, 1928, a large piece of rock, weighing five tons, broke away and fell down the slope, crashing into the plaintiff Jenkins' dwelling-house and causing damage. An inspector of the Ministry of Health with a representative of the Geological Survey visited the place, and reported in May, 1928, that the fall of the rocks was due to weathering, and was not due to any mining or quarrying operations, and that further falls appeared to be imminent. The cost of the works necessary to render the rocks reasonably safe for the time being was estimated at between 300*l.* and 450*l.* On January 20, 1928, the plaintiff council served upon the defendant a notice under s. 94 of the Public Health Act, 1875, complaining that the rocks, in their condition, constituted a nuisance within s. 91 of the Act, and requiring him to abate such nuisance. The notice was not complied with, and the defendant denied liability.

The question for the opinion of the Court was whether the defendant was or was not liable to the plaintiffs, or either of them, to execute the works required, and, if so liable, also to execute from time to time such further works as might be necessary to maintain the rocks in a condition of safety.

Luxmoore K.C. and *R. A. Glen* for the plaintiffs. The rocks on the defendant's land are "premises which are in such a state as to be a nuisance or injurious to health" within s. 91 of the Public Heath Act, 1875. The word "premises" is defined in s. 4 as including "lands and premises of any tenure." There is no definition of nuisance in the Act, but in Hawkins' Pleas of the Crown, 8th ed., vol. i., p. 692, a common nuisance is said to include "neglecting to do a thing which the common good requires." It is not suggested that the defendant has brought anything on his land or done anything to the land to make it dangerous or a nuisance, but he knows that the rocks are in a dangerous state and is bound to do anything he can to prevent them from falling. In *Attorney-General* v. *Tod Heatley* (1) the owner of the land

(1) [1897] 1 Ch. 560.

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did not create any nuisance, but he knew a nuisance existed, and was held liable for not remedying it. The word "nuisance" is not confined to nuisances injurious to health: *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1) *Barker* v. *Herbert* (2) is distinguishable, as there the owner of the land neither created the nuisance nor suffered it to continue. Land left in its natural condition may become a nuisance for which the owner will be liable: *Noble* v. *Harrison.* (3) In that case a branch of a tree overhanging the road fell and injured the plaintiff, but the owner was held not to be liable, because the defect was latent, and he did not and could not have known the tree was dangerous. Here the rocks are known by the defendant to be dangerous, and it is his duty to take steps to prevent them falling.

[They also referred to *Margate Pier Proprietors* v. *Margate Town Council* (4) and *Clayton* v. *Sale Urban District Council.* (5)]

Trevor Hunter K.C. and *Russell Gilbert* for the defendant. The plaintiffs by this special case are seeking to impose a novel liability upon any landowner who may own a hill or a mountain. It would be almost an impossible task to prevent any of these rocks falling, as the cliff face extends for many hundreds of yards.

So long as an owner of land uses it in a natural and ordinary way he is not liable if something escapes from it and causes damage. This general principle is stated in *Rylands* v. *Fletcher* (6), and the decision in that case shows an exception to it. In *Giles* v. *Walker* (7) the occupier of land was held not bound to cut thistles naturally growing on his land and seeding, which were complained of as being a nuisance. The cases where trees have been held to be a nuisance, such as *Crowhurst* v. *Amersham Burial Board* (8), proceed on the ground that they have been planted on the land by the defendant or his predecessors in title: *Smith* v. *Giddy.* (9)

(1) (1876) 10 Q. B. D. 138, 141.
(2) [1911] 2 K. B. 633, 637.
(3) [1926] 2 K. B. 332.
(4) (1869) 20 L. T. 564, 568.
(5) [1926] 1 K. B. 415.
(6) (1868) L. R. 3 H. L. 330, 338.
(7) (1890) 24 Q. B. D. 656.
(8) (1878) 4 Ex. D. 5.
(9) [1904] 2 K. B. 448.

Sect. 91 of the Public Health Act, 1875, does not add any new statutory nuisance to the common law. It is a primal necessity for its application that the condition of the land shall constitute a nuisance. *Attorney-General* v. *Tod Heatley* (1) does not deal with the point raised in this case. Both in that case and the *Margate Pier* case something had been placed on the land which became a nuisance. If persons choose to build in valleys in mountainous districts they do so at their own risk. There is no distinction in principle between the case of water falling and rock falling.

[They also referred to *Cheshire Lines Committee* v. *Heaton Norris Urban Council* (2) and *Carshalton Urban Council* v. *Burrage*. (3)]

In *Job Edwards, Ld.* v. *Birmingham Navigations* (4) Scrutton L.J. said: "I say 'artificial nuisance,' for he may not be liable for natural nuisances, such as thistles; or weeds growing in a stream."

Luxmoore K.C. in reply. It is not the existence of the rocks but the state of the rocks which creates the nuisance: *Rickards* v. *Lothian* (5); *St. Anne's Well Brewery Co.* v. *Roberts*. (6)

Cur. adv. vult.

EVE J. This is an action for a declaration that a bank of rocks on the estate of which the defendant is tenant for life in possession constitutes a nuisance within the Public Health Act, 1875, or alternatively a private common law nuisance to the plaintiff Jenkins, and the special case which under Order XXXIV. has been stated by consent for the opinion of the Court submits the questions whether the defendant is liable to the plaintiffs or either of them forthwith to execute, at a cost of from 300*l.* to 450*l.*, works necessary to prevent immediate danger from the said rocks, and from time to time hereafter to execute such further works as may be necessary to maintain the said rocks in a state of safety.

It is not a case where the landowner has erected or brought upon his land something of an unusual nature which is

(1) [1897] 1 Ch. 560.
(2) [1913] 1 K. B. 325.
(3) [1911] 2 Ch. 133.
(4) [1924] 1 K. B. 341, 355.
(5 [1913] A. C. 263.
(6) (1929) 140 L. T. 1

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essentially dangerous in itself. The rocks in question are near the summit of a bluff or cliff facing in a north-westerly direction and near the northern boundary of the plaintiff's settled estate. They are part of the natural formation, their presence is not due to any quarrying or other operation, and a fall which took place in January, 1928, and did damage to the premises of the plaintiff Jenkins, was due to weathering, and was not caused by subsidence due to mining operations.

The action is, therefore, an attempt to impose on an owner, who is using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies.

Such an action cannot in my opinion be maintained. There is no authority to support it, but a steady stream flowing in the opposite direction.

The first paragraph of the headnote to the report of *Rylands* v. *Fletcher* (1): "Where the owner of land, without wilfu ness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages," is justified by the language of the Lord Chancellor where he says: "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place," and as an illustration of that principle he refers to the case of *Smith* v. *Kenrick* (2), where the defendant, the owner of a coal mine on the higher level, having worked out the whole of his coal without having any barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower

(1) L. R. 3 H. L. 330, 338. (2) (1849) 7 C. B. 515.

mine and obstructed the owner of it in getting his coal, was held not liable in damages to the owner of the lower mine, because as owner of the upper mine he had a right to remove all his coal, and the damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. In *Giles* v. *Walker* (1), which was an action to recover damages arising from thistle seeds blown by the wind in large quantities from the defendant's land on to the plaintiff's adjoining land, it was urged that the defendant, by bringing into cultivation what had theretofore been forest land, had disturbed the natural condition of things, and caused the thistles to grow, thereby creating a nuisance. The action was dismissed, Lord Coleridge C.J. observing: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil," and Lord Esher M.R. concurred. Wright J. in *Blake* v. *Woolf* (2) stated the general rule and the exception in these terms: "The general rule as laid down in *Rylands* v. *Fletcher* is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water, which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him," and that statement was cited with approval by the Privy Council in *Rickards* v. *Lothian*. (3)

Many other passages to a similar effect are to be found in the books, but I think I have quoted enough to show that I have no alternative but to answer the questions submitted in the negative and to dismiss the action, and I so do.

Solicitors: *Burton, Yeates & Hart, for J. Haydn Thomas & Morgan Davies, Pontardawe; Collyer-Bristow & Co., for R. & C. B. Jenkins & Lloyd, Swansea.*

(1) (1890) 24 Q. B. D. 656. (2) [1898] 2 Q. B. 426, 428.
(3) [1913] A. C. 263, 280.

H. L. L.

EVE J.

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Jan. 23, 24; *Feb.* 26.

In re WHITAKER.

ROOKE *v.* WHITAKER.

[1928. W. 3407.]

Tenant for Life and Remainderman—Cost of Repairs—Repairs done to meet Requirements of Dangerous Structure Notices—How Costs to be borne as between Capital and Income—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 71, 73, *sub-s.* 1 (*iii.*); *ss.* 83, 102; *Sch. III.—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28.

Dangerous structure notices were served by a local authority on trustees in respect of houses forming part of a trust estate. The necessary work involved pulling down, rebuilding, and reinstatement of the houses:—

Held, that the work involved structural reconstruction of a permanent nature, and that therefore the cost was to be provided for out of capital.

In re Robins [1928] Ch. 721 and *In re Gray* [1927] 1 Ch. 242 distinguished.

By his will, dated December 20, 1908, the testator gave all the residue of his estate and effects to his trustees upon trust for conversion, and, after payment of his funeral and testamentary expenses, to invest the residuary proceeds (thereinafter called "the trust fund"), and to pay the income thereof to his wife during her life so long as she should continue his widow, and from and after her remarriage to pay her during the remainder of her life 100*l.* per annum, and, subject thereto, his trustees were to hold the trust fund and the income thereof upon trust for such of his children as being sons or a son attained twenty-one, or being daughters or a daughter attained that age or married, and if more than one in equal shares, and, after making provision for the settlement of his daughters' shares of the trust fund, the testator empowered his trustees to postpone the conversion of all or any part of his residuary estate, and gave them full powers to manage, lease, and generally deal with the same as though they were absolute owners thereof.

The testator died on July 17, 1918, leaving a widow and six children him surviving. Included in his residuary estate were a number of small and old freehold houses situate in

Bethnal Green, producing an average net yearly income, after allowing for ordinary repairs and other current outgoings, of about 800*l*. According to the evidence the houses had been kept in sufficient tenantable repair at the expense of income, but recently an expenditure of between 400*l*. and 500*l*. had been incurred in meeting the requirements of several dangerous structure notices served by the London County Council in respect of some of the houses. The necessary work involved pulling down, rebuilding, and reinstatement, and it was in the main occasioned by the age of the buildings, and by defects in their original faulty construction, such as the absence of proper damp courses.

This summons was issued by one of the trustees of the testator's will, and it raised the question whether the expenditure so incurred was to be met out of capital or income, or partly out of each.

1929. Jan. 23, 24. *J. A. Hay* for plaintiff.

Winterbotham for the tenant for life. Where trustees carry out repairs, not of their own volition, but in compliance with an order of the local authority, the cost of such repairs must be borne by capital. The latest case suggests that there is a discretion, but there is no such suggestion in the earlier cases, and there are no cases at all similar to the present where such costs have been thrown on income. *In re De Teissier's Settled Estates.* (1) *In re Barney* (2) is exactly the present case. This case may be stronger, because there is a trust for sale here. *In re Lever* (3) is also like the present case. If the matter is in the discretion of the Court, then it ought to exercise its discretion in favour of the tenant for life: *In re Tucker's Settled Estates* (4); *In re Farnham's Settlement.* (5) *In re Copland's Settlement* (6) is a curious case, not on all fours with the present.

The point is not affected by the recent legislation: Law of Property Act, 1925, s. 28, sub-ss. 1, 2; Settled Land Act, 1925, s. 102, sub-s. 2. Here the trustees have obviously

(1) [1893] 1 Ch. 153, 161–2.
(2) [1894] 3 Ch. 562.
(3) [1897] 1 Ch. 32.
(4) [1895] 2 Ch. 468.
(5) [1904] 2 Ch. 561.
(6) [1900] 1 Ch. 326.

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declined to exercise their power to pay for these works out of income, and there is no express provision requiring repairs to be paid out of income. The tenant for life is entitled, absolutely or by proper exercise of judicial discretion, to have these expenses thrown on capital. *In re Robins* (1) and *In re Gray* (2) are the only two cases since the new legislation. This case is covered by *In re Robins* (1), where Tomlin J. held, following *In re Hotchkys* (3), that the cost must be borne by capital. In *In re Gray* (2), where Clauson J. held that the costs had to be borne by income, the trustees had already exercised their discretion, and had paid the costs out of income.

Ronald F. Roxburgh for the remaindermen. Sect. 28, sub-s.1, of the Law of Property Act, 1925, confers upon trustees for sale all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925. Amongst such powers are those relating to improvements which are to be found in s. 83 of the Settled Land Act and following sections, and in Sch. III. The repairs in question are improvements within Part II. of Sch. III., and therefore the Court can properly authorize them, and at the same time require the costs, or some part of the costs, to be recouped to capital by instalments—s. 84, sub-s. 4. The Court should so require in this case, because the net rents bear an unusually high proportion to the gross rents. Clauson J. was right in saying, in effect, in *In re Gray* (2) that in view of the new legislation the Court ought not to fall back upon general principles and apply *In re Hotchkys* (3), and the difficulty which Tomlin J. felt in *In re Robins* (1) would not have existed if he had been referred to all the relevant sections of the Settled Land Act.

Winterbotham in reply. The repairs in this case come within Part I. of Sch. III. of the Settled Land Act, and the costs must be borne by capital.

Cur. adv. vult.

Feb. 26. EVE J. Similar applications have been the subject of recently reported decisions by two of my

(1) [1928] Ch. 721. (2) [1927] 1 Ch. 242.
(3) (1886) 32 Ch. D. 408.

colleagues. In *In re Gray* (1) Clauson J. held that the cost of the particular repairs therein dealt with—due mainly to the fact that the exterior of the premises had not been kept in a proper state of repair for a period of several years—must fall on income. In *In re Robins* (2) Tomlin J. had to deal with expenses incurred in complying with the requirements of a dangerous structure notice, and held that the case was one in which the principles laid down again and again in such cases as *In re Hotchkys* (3) ought to be adhered to, and ordered the repairs to be paid for out of corpus.

If I may respectfully so say no possible exception can be taken to either conclusion. In the former case the expenditure was to make good defects due to periodic neglect—in the latter it involved structural reconstruction of a permanent nature, and I entirely accept as applicable to the case I am now deciding Tomlin J.'s statement. (4) Apart from recent legislation, *In re Robins* (2) and this present case are ones in which the Court would undoubtedly have held the expenditure to be of such a character that it ought, upon the general principles governing the Court in matters of this kind, to be borne by capital—so that the burden be distributed between capital and income, capital losing the sum and income losing the interest on the sum : *In re Barney* (5) ; *In re Lever* (6) ; *In re Farnham's Settlement.* (7)

The learned judges do not appear to have taken quite the same view as to the effect of recent legislation on the jurisdiction of the Court to deal with the costs of repairs in the way in which they were dealt with in *In re Hotchkys.* (3) Clauson J. regarded the statutory powers conferred by s. 28 of the Law of Property Act, 1925, and s. 102 of the Settled Land Act, 1925, as in the nature of a code defining the powers of the trustee and the way he can exercise them, and leaving no room for the application by the Court of the equitable principles laid down and applied in *In re Hotchkys.* (3)

(1) [1927] 1 Ch. 242.
(2) [1928] Ch. 721.
(3) (1886) 32 Ch. D. 408.
(4) [1928] Ch. 733.
(5) [1894] 3 Ch. 562.
(6) [1897] 1 Ch. 32.
(7) [1904] 2 Ch. 561.

EVE J.
1929
WHITAKER, *In re.* ROOKE *v.* WHITAKER.

Tomlin J., on the other hand, took the view that in cases where the trustees surrender their discretion to the Court, the Court is in the same position to-day as it was before January, 1926, and is free to determine the question according to the principles of the earlier decisions, and *In re Hotchkys* (1) in particular.

Mr. Roxburgh has argued that these views are not so irreconcilable as they might at first sight appear. He points out that in neither case was any reference made to s. 83 or Sch. III. of the Settled Land Act, and insists that a careful examination of the latter will demonstrate that not only is every kind of work on or in connection with, or for the benefit of the settled land therein mentioned, but that they are all so classified as to indicate how the incidence of costs is to be dealt with.

By s. 28 of the Law of Property Act "trustees for sale shall, in relation to the land . . . . and to the proceeds of sale, have all the powers of a tenant for life." By s. 73, sub-s. 1 (iii.), of the Settled Land Act capital money arising under the Act may be applied in payment for any improvement authorized by the Act, and by s. 83 improvements authorized by the Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the works mentioned in the Third Schedule to the Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes.

The Third Schedule is divided into three parts; in the first part are enumerated under twenty-five heads, improvements the costs of which are not liable to be replaced by instalments—that is to say improvements to be paid for out of capital. Part II. contains a list of improvements under six heads, the costs of which the trustees of the settlement or the Court may require to be replaced by instalments, and Part III. a list under three heads, the costs of which the trustees of

(1) 32 Ch. D. 408.

the settlement and the Court must require to be replaced by instalments.

An examination of this Schedule cannot but lend support to Clauson J.'s view that the legislature intended as far as possible to establish something in the nature of a code in these matters. The trustee must first ascertain in which part of the Schedule the improvements must be included; if in Part I. it will fall to be paid for wholly out of capital, if in Part III. it must ultimately be paid for out of income, and if in Part II. he, or, if he prefers to refer the matter to the Court, the Court must determine to what extent, if any, the cost is to be contributed to by income. I do not think it can be doubted that in determining an application of this last mentioned nature the Court would have jurisdiction to apply general equitable principles. Indeed it is difficult to see what others could be resorted to in such circumstances.

In *In re Gray* (1) the work done was held to fall within s. 102 of the Act; in *In re Robins* (2) it was not within that section, but was included either in para. XXV. of Part I. or para. V. of Part II. of Sch. III.; and in the one alternative it was by statute to be paid for out of capital; in the other it was open to the Court to relieve income of any burden, except the loss of interest on the capital so expended.

I think that state of things is reproduced in this case, and I therefore declare that the whole of the sum expended on, or in connection with, or for the benefit of the settled land in complying with the requirements of the London County Council is to be provided out of capital. The money required can be raised by mortgage of the settled land, or any part thereof under s. 71 of the Act.

Solicitors: *Rooke & Sons; The Official Solicitor.*

(1) [1927] 1 Ch. 242. (2) [1928] Ch. 721.

P. J. B.

EVE J.
1929
Feb. 13.

In re BAKER.

BAKER *v.* BAKER.

[1928. B. 2239.]

Will—Codicil—Revocation by later Will—Codicil to second Will—Third—Codicil referring only to and confirming first Will—Revival of first Will and implied Revocation of second Will and Codicil thereto.

A will and codicil made by a testatrix in 1893 were revoked by a will made in 1907. In 1911 the testatrix made a codicil to the will of 1907 declaring that a share in her estate thereby given to a son should be held upon protective trusts. In 1921 the testatrix executed a third codicil which referred only to the will and codicil of 1893, altered some of the provisions of the will and otherwise confirmed it:—

Held, that the effect of the codicil of 1921 was to revoke both the will of 1907 and the codicil of 1911, and to revive the will and codicil of 1893.

ORIGINATING SUMMONS.

The testatrix, Elizabeth Baker, by her will dated February 21, 1893, appointed her sons W. Baker and J. A. Baker and her daughter Elizabeth Baker executors and trustees thereof, and devised and bequeathed her real and personal estate upon trust for conversion and investment and to pay the net income to her daughter Elizabeth Baker and Ada Annie Summers in equal shares until either of them should either marry or die, and then to the other or survivor of them. Subject thereto the testatrix gave the capital of her residuary estate equally between all her children living at her death and the issue of any of those who should have died leaving issue.

The testatrix made a codicil on the same date, February 21, 1893, the contents of which are not material.

On April 16, 1907, the testatrix executed another will by which she revoked all previous testamentary dispositions. She appointed the same persons executors and trustees, and made the same specific bequests as in the will of 1893. She then bequeathed three leasehold houses, Nos. 6, 14 and 16 Waterloo Road, Bethnal Green, to her daughters Elizabeth Baker and Emmeline Treverton and her son Alfred Harding Baker respectively. The will concluded with a devise and

bequest of residuary real and personal estate upon trust for conversion and to divide the proceeds between such of her children and her grandchild Marjorie Summers (upon attaining the age of twenty-one years) as should be living at her death, and the issue of such as should then be dead leaving issue.

In July, 1911, her son Alfred Harding Baker was adjudicated bankrupt, and by a codicil dated November 25, 1911, and expressed to be a codicil to her last will, she directed that any interest thereby given to or conferred on the said A. H. Baker should be held by her trustees upon protective trusts for the benefit of himself and his wife and children.

On October 11, 1921, the testatrix made a further codicil in the following terms: "I, Elizabeth Baker of Claremont, 5 Hengist Road, Bournemouth, Hants, widow make a second codicil to my will dated the 21st of February 1893 to which I made a first codicil on the 21st of February 1893. Notwithstanding the trust for sale of all the residue of my property contained in my said will I give my house Claremont aforesaid to my daughter Elizabeth Baker now residing with me for her life and I request her to allow my grand-daughter Marjorie West Saunders (should she desire to do so) to reside therein with her rent free so long as she is unmarried.

2. In all other respects I confirm my said will and codicil."

The testatrix died on July 4, 1923, and by an order of the Probate Division dated October 18, 1926, probate was granted in solemn form of all five testamentary documents. The testatrix had six children, three sons and three daughters. One daughter Ada Annie Summers predeceased her, leaving one child the defendant Marjorie West Summers, who had attained twenty-one years of age. The codicil of 1921 was executed at Bournemouth and prepared by a solicitor who had only the first will and codicil (which had been retained by the testatrix in her own custody) before him. The second will and codicil had been left by the testatrix with her solicitors in London.

EVE J.
1929
BAKER, *In re.*
BAKER *v.* BAKER.

The summons was taken out by the plaintiffs to determine whether the second will and codicil were or were not revoked and the first will and codicil revived by the third codicil.

G. E. Timins for the plaintiffs.

J. V. Nesbitt for the defendant Elizabeth Baker.

The testatrix revoked the second will and revived the first will by the last codicil. The present case is governed by *Lord Walpole* v. *Lord Orford.* (1) But although the second will is revoked, it is quite possible that the codicil to it was not revoked. That point appears to have been left open by the decision in *Crosbie* v. *MacDonal.* (2) The intention of the testatrix, as expressed in the second codicil, was equally applicable to the interest given to her son Alfred by the first will and was never revoked: *In the Goods of Chilcott.* (3)

Beebee for the defendant Emmeline Treverton. The codicil of 1921 does not revoke any previous will or codicil. The only reasonable construction is to treat that codicil as confirming all previous testamentary dispositions except so far as it alters them or they are inconsistent with each other: *Follett* v. *Pettman.* (4)

Howard Wright for the trustee in bankruptcy of Alfred Harding Baker.

It is for the Court of construction to construe the meaning and give effect to every document admitted to probate: Jarman on Wills, 6th ed., p. 44. The mere fact that a codicil is described as a codicil to a revoked will is not sufficient to revive the will, unless there is something definite contained in the codicil showing an intention so to do. Here there is such an intention found in the words "notwithstanding the trust for sale contained in my said will": Wills Act, s. 22; *McLeod* v. *McNab.* (5) If the will of 1907 falls the codicil of 1911 goes with it.

Linton Thorp for children of the defendant Alfred Harding Baker.

(1) (1797) 3 Ves. 401a.
(2) (1799) 4 Ves. 610, 617.
(3) [1897] P. 223.
(4) (1883) 23 Ch. D. 337.
(5) [1891] A. C. 471, 475.

The final codicil may revive the first will to the extent that it is not inconsistent with the will of 1907, but it does not revoke the latter will, or the codicil of 1911. Both wills come into operation, and the intention of the testator must be extracted from all the documents taken together. Therefore the discretionary trust in the codicil of 1911 must be given effect to.

EVE J. The testatrix made a will on February 21, 1893, whereby she devised and bequeathed her residuary estate upon trust for conversion and investment, and directed that the income thereof should be paid to her two daughters, one of whom was a widow, in equal shares, until either of them should marry or die, and upon the marriage or death of either the whole income was to be paid to the other until she in turn should marry or die; upon the death or marriage of the survivor the capital and income were to be held in trust for such of the testatrix's children, sons and daughters, as should be living at the testatrix's death and the issue then living of any then deceased son or daughter. Mrs. Summers, the widowed daughter, died in the lifetime of the testatrix, leaving a daughter who survived the testatrix and is a respondent to this summons. On the same date as her will the testatrix executed a codicil which is immaterial; it only dealt with certain specific articles of furniture and adornment. On April 16, 1907, after the death of Mrs. Summers, she made another will; in part it repeated the bequests and provisions of the earlier one, but contained one material alteration, in that the life interest of Elizabeth, the survivor of the two daughters, was eliminated, and after payment out of the proceeds of conversion of the funeral and testamentary expenses and debts, the trustees were to stand possessed of the net residue for "such of them my children and my grandchild, provided she should attain the age of 21, as should be living at my death or should be then dead, leaving issue then living, in equal shares." The will purported to revoke all former testamentary dispositions, and prima facie would supersede the will of 1893 and the codicil of even date.

EVE J.
1929
BAKER, *In re.* BAKER *v.* BAKER.

The next event which happened was that one of her sons, Alfred, was adjudicated a bankrupt in the month of July, 1911, and following upon that misfortune, the testatrix made a codicil on the 25th of the following November, which is almost entirely confined to the one-sixth share which she contemplated he would take. She declared this codicil to be a codicil to her will of April 16, 1907, and directed that " any interest to be given to or conferred upon my son Alfred by my said will, whether by specific bequest or of or in the proceeds of or funds representing my residuary and personal estate, and whether such interest be by way of original or substituted gift or arise by accrual or otherwise " should be held upon certain protective trusts for the benefit of his wife and children, and indirectly of himself, with the obvious intention of preventing the property reaching the hands of the trustee in bankruptcy. In the will of April, 1907, there were dispositions in favour of Alfred sufficient to satisfy the introductory language used by the testatrix in this codicil, the object of which was to settle all that Alfred would otherwise have taken under that will in the manner which I have indicated.

There matters stood for nearly ten years until October 11, 1921, when the testatrix was minded to make a further codicil. This codicil was drafted by a solicitor who had in his possession the will of February 21, 1893, and the codicil thereto. It is quite obvious—no one can read the short codicil without realizing the fact—that the mind of the testatrix was focussed upon that will and its provisions. She first of all states that she is making a codicil to the will of February 21, to which she had already made a first codicil on the same February 21, and then follow two short paragraphs. The first is : " Notwithstanding the trust for sale of all the residue of my property contained in my said will "—that is the will of 1893 —" I give my house, ' Claremont ' aforesaid "—that being the address as of which she is described—" to my daughter Elizabeth Baker now residing with me for her life, and I request her to allow my granddaughter Marjorie West Saunders (should she desire so to do) to reside therein with

her rent free so long as she is unmarried." Para. 2 says: "In all other respects I confirm my said will and codicil." That is the whole of the codicil.

What is the effect of that codicil? It restores and republishes the will of 1893. The testatrix not only refers to the will by date, she refers to the first codicil of the same date; to the trust for conversion of the residue; and, a few lines later, in plain and explicit language, confirms her said will and codicil. The result of that is to displace the second will and to restore the first; it becomes both first and last. In these circumstances the questions raised by the summons must be determined by the provisions of the will so revived and this last codicil. Accordingly the answer to the first question is that Elizabeth Baker takes a life interest in the house "Claremont," and an interest so long as she lives and remains unmarried in the income of the residuary estate. The other questions deal with the disposition made by the codicil to the second will; does the codicil of November 25, 1911, survive or does it fall with the second will? In my opinion it falls with the second will. It only purports to deal with the dispositions of the second will, and on the execution of the codicil of October, 1921, this second will ceased to have any operation, and thereupon nothing survived upon which the codicil varying the second will could operate. In these circumstances I think the argument on behalf of the trustee in bankruptcy prevails, and in the events which have happened the specific bequests to Miss Elizabeth Baker, to Alfred and to Mrs. Treverton, of the houses in Waterloo Road fail, and the trust declared by the testatrix as to the interests given by her to Alfred is not effective.

Solicitors: *R. Voss & Co.; Thorp, Saunders & Thorp; Tarry, Sherlock & King.*

H. L. L.

EVE J.
1929
Feb. 22.

In re SAUNDERS.

PUBLIC TRUSTEE *v.* SAUNDERS.

[1928. S. 2770.]

Administration—Intestate Estate—Death of Husband, leaving Widow but no Issue—Charge of 1000l. with Interest in favour of Widow—Interest charged on Capital of Estate—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1 (*i.*).

Under s. 46, sub-s. 1 (i.), of the Administration of Estates Act, 1925, interest becoming payable on the sum of 1000*l.* thereby charged on the estate of an intestate in favour of a surviving wife or husband is not a charge upon the income but upon the corpus of the estate.

ORIGINATING SUMMONS.

The summons was taken out by the plaintiff, as one of the legal personal representatives, to determine various questions arising out of the administration of the estate of A. C. Saunders, who died intestate on July 18, 1926. Letters of administration were granted to the plaintiff and to the defendant L. E. Saunders, the widow of the intestate, on August 26, 1927. The intestate left no issue, and his next of kin at the date of his death were his widow, three brothers and four sisters. The gross estate of the intestate was sworn at 2495*l.* 10*s.* 3*d.*, including a freehold house, "Thorndene," Chobham Road, Sunningdale, valued at 900*l.*, but subject to a mortgage on which 327*l.* was due, and two cottages at Ascot valued at 660*l.*

The widow claimed to be a creditor of her husband's estate for 745*l.*, and she also desired to purchase the freehold house and cottages, and to set off against the purchase money the 1000*l.* to which she became entitled under the Administration of Estates Act, 1925. At the date of the hearing of the summons neither the 1000*l.* nor any interest thereon had been paid to the widow.

The only question raised calling for a report was whether the interest payable on the sum of 1000*l.* under s. 46 of the Act was payable out of the corpus or the income of the intestate's estate.

B. S. Tatham for the plaintiff.

C. E. Harman for the widow. The sum of 1000*l.*, the death duties thereon and costs "with interest thereon from the date of the death at the rate of 5 per cent. per annum until paid or appropriated," must be taken out of the real and personal estate before the net residuary estate can be ascertained. The widow is entitled to the income of that estate during her life, and she would get no benefit from the interest on the 1000*l.* if it were a charge on income, therefore it must be a charge on the capital of the estate.

L. F. Mumford for the defendant W. W. Saunders, a brother of the deceased. The interest on the 1000*l.* should come primarily out of income. Under s. 33, sub-s. 5, income of an intestate's estate is to be treated and applied as income as from the death of the deceased; and for that purpose an apportionment may be made between tenant for life and remainderman. At any rate, as from the end of the first year from the death, the widow cannot take the income of the whole estate and the interest of 50*l.* on the 1000*l.* charged on the estate as well.

EVE J. The question with which I have to deal is one arising under s. 46 of the Administration of Estates Act, 1925, regulating the succession to real and personal estate on intestacy. By the section it is enacted that "if the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of 1000*l.* free of death duties and costs to the surviving husband or wife with interest thereon from the date of the death at the rate of 5 per cent. per annum until paid or appropriated and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held

"(*a*) If the intestate leaves no issue upon trust for the surviving husband or wife during his or her life.

"(*b*) If the intestate leaves issue upon trust as to one half for the surviving husband or wife during his or her life."

EVE J.
1929
SAUNDERS, *In re.* PUBLIC TRUSTEE *v.* SAUNDERS.

The question is whether the 5 per cent. interest on the 1000*l.* ought to be paid out of the corpus of the residuary estate or out of the income arising therefrom. I think the answer is obvious; the 1000*l.* with the interest thereon is charged upon the residuary estate other than the personal chattels, and it is only "subject to providing for that sum and the interest thereon" that there can be any surplus available for investment as an income-producing fund. In my opinion, therefore, the 1000*l.* and the interest must be paid out of the corpus of the residuary estate. Were it otherwise the surviving spouse would be paying the whole or half of the interest according as the income of the net residue fell to be dealt with under para. (*a*) or (*b*). This conclusion brings the existing legislation into accord with the provisions of s. 2 of the repealed Intestates Estates Act, 1890.

The costs must be taxed and paid out of residue.

Solicitors: *Joynson-Hicks & Co., for Dallas, Brett & Pound, Egham; G. C. Whadcoat; Speechly, Mumford & Craig.*

H. L. L.

CLAUSON J.

1929

Feb. 20.

In re BINNS.

PUBLIC TRUSTEE *v.* INGLE.

[1928. B. 2806.]

Will—Share of Residue—Children taking Share of deceased Parent by Substitution—Non-liability of Children to account for Debt of Parent owing to Testator's Estate.

The principle deducible from the dictum of the Court of Appeal expressed in *In re Scott* [1903] 1 Ch. 1, at p. 9—namely, that, in the distribution of a testator's estate amongst his children and the children of deceased children, children claiming to take by substitution the share of their deceased parent must bring into account an advancement made by the testator in his lifetime to their parent—is not applicable to the case of a parent's indebtedness to the testator; so that, where a testator gave his residuary estate in trust for his children living at the period of distribution and the children of any child then dead, grandchildren are not liable, upon claiming their deceased parents' share, to bring into account a debt owing by the parent to the testator's estate.

ADJOURNED SUMMONS.

Charles Binns, by his will dated April 13, 1875, gave his residuary estate upon trust for such child or children of his as should attain the age of 21 years or marry, and declared that the share of any daughter of his should be held upon trust to pay the income thereof to such daughter during her life and after her decease upon trust for such child or children of his same daughter as should be living at her decease and attain the age of 21 years or marry and such child or children of any child or children of his same daughter dead at her decease as should be living at her decease and attain the age of 21 years or marry, if more than one in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased child should take only such share as his, her or their parent would have taken if living. But in case there should be no such child or grandchild of his same daughter then in trust for the testator's other child or children or the issue of such other child or children respectively who should be living and should attain the age of 21 years or marry

CLAUSON J. 1929 BINNS, *In re.* PUBLIC TRUSTEE *v.* INGLE.

as aforesaid, if more than one in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased child should take only such share as his, her or their parent would have taken if living; and the share or respective shares so accruing to the other or remaining object or objects of the trusts thereinbefore contained so far as the same should be then subsisting and capable of taking effect should be subject to all the trusts directions and provisions in the will contained concerning the original share or shares of such object or objects respectively as fully and effectually as if the same were repeated.

The testator died on May 30, 1895, leaving him surviving six children—namely, Martha, Mary, Albert, Charles, John and Frederick—all of whom attained the age of 21 years.

On November 8, 1927, Martha died, a spinster, leaving only her sister, the defendant Mary Ingle, and her brother John Binns surviving her. Frederick Binns had died during Martha's lifetime, leaving children who survived her.

In 1894 the testator placed on deposit with a bank a sum of 2400*l.* as a continuing security for any moneys owing to the bank by the firm of John and Frederick Binns, in consideration of which security the bank allowed John Binns to overdraw.

On October 28, 1895, the firm of John and Frederick Binns were adjudicated bankrupt, and trustees were appointed of their joint and separate estates. The bank proved for the amount due to them on the overdraft, and the whole of the 2400*l.* so deposited by the testator was subsequently appropriated by the bank in or towards its discharge.

Upon this summons for the determination of certain questions which arose as to the devolution of the testator's daughter Martha's settled share upon her death, it was held by Clauson J. that Albert Binns who had died a bachelor in Martha's lifetime, was not entitled to any part of his sister's share, and also that the share of John Binns was upon the authority of *In re Melton* (1), which overruled *In re Binns* (2),

(1) [1918] 1 Ch. 37. (2) [1896] 2 Ch. 584.

payable to the official receiver as trustee in the bankruptcy of John and Frederick Binns subject to his accounting for the 2400*l.*; the operation of the order of North J. in *In re Binns* (1) being, in the opinion of Clauson J., upon its proper construction, limited to the fund then in the hands of the trustees of the will. The only question raised by the summons which was material for the purposes of this report was, whether the children of Frederick Binns were liable to bring into account one-half or some other and what part of the 2400*l.* against the share which their father Frederick would have taken in the settled share of his deceased sister Martha, if he had survived her.

Beebee for the trustee of the will.

G. E. Timins for Mrs. Mary Ingle. The children of Frederick must account for the debt which their deceased parent owed the testator's estate and for which he must have accounted had he himself claimed his share. The principle recognized in *In re Scott* (2) relating to an advancement by a testator is similarly applicable to the case of a debt. In *In re Melton* (3) Warrington L.J. expressed a view that trustees in such a case were in the position of secured creditors and had a sort of lien on the fund in their hands. The scheme of the will is that a child should take precisely what the deceased father would have taken had he been living to claim his share.

H. B. L. Braund for the children of Frederick Binns. The principle to be deduced from the dictum expressed in *In re Scott* (4) does not apply to the case of a debt, which this case is. There is a distinction between the cases of an advancement and a debt. In the former case there is a presumption that the father has in mind a scheme for the distribution of his property amongst his children; and, if he afterwards makes a gift to a child by way of portion in his lifetime, the gift is assumed to be in anticipation of the scheme and to be in part performance of it: *In re Scott* (4); *In re Lacon.* (5)

(1) [1896] 2 Ch. 584.
(2) [1903] 1 Ch. 1.
(3) [1918] 1 Ch. 37, 57.
(4) [1903] 1 Ch. 1, 9.
(5) [1891] 2 Ch. 482.

CLAUSON J. 1929 BINNS, *In re.* PUBLIC TRUSTEE *v.* INGLE.

A beneficiary in the position of a debtor to the testator's estate may not claim a legacy without offering to bring into account the debt which he owes, upon the principle that he has already in his hands a part of the testator's assets out of which he must first pay himself: *Cherry* v. *Boultbee* (1); *Courtnay* v. *Williams* (2); *In re Akerman.* (3)

Harold A. H. Christie, A. C. Edgar and *Stafford Crossman* for other parties interested.

CLAUSON J. In order to make intelligible the point which now arises for my decision, it will be sufficient to say that a share of the testator's residue was left by him upon trust for a daughter for life and after her death upon certain trusts for her children and grandchildren. She died, recently, a spinster, and, accordingly, the provisions which I am about to read take effect: "In case there shall be no such child or grandchild"—that is the event which happened—her share is to be held "in trust for my other child or children or the issue of such my other child or children respectively who shall be living and shall attain the age of 21 years or marry as aforesaid if more than one in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased child shall take only such share as his her or their parent would have taken if living." There was one son of the testator, Frederick, who died in the year 1924 in the lifetime of the lady whose death has given rise to the present question. He has left children who claim under the clause I have just read, a share in the fund which is now available for distribution. If their parent Frederick had been living at this moment and had, accordingly, come forward to claim a share in this fund, the trustees would, first of all, have said to him: "You went bankrupt some years ago, and it is your trustee in bankruptcy who must make the claim." They would then have said to the trustee in bankruptcy: "The estate which you represent has in fact received a certain sum on account of this share, in this sense,

(1) (1839) 4 My. & Cr. 442. (2) (1846) 15 L. J. (Ch.) 204.
(3) [1891] 3 Ch. 212.

that your estate still owes the estate of the testator something, and that something we, the trustees, are entitled to deduct from the sum which would otherwise be payable to you out of the fund now available for division." However, Frederick is dead. Having regard to the construction I have already placed upon the terms of this will, neither he nor his trustee in bankruptcy can come forward and claim any part of this share; but, as I have said, his children do come forward and claim the share which Frederick would have taken, if living. The trustees seek to say: "You, the children of Frederick, are entitled only to take such share in the fund at present in course of distribution as Frederick would have received if living. If Frederick had been living and had come forward and claimed this share, we should have been entitled to retain it to make good a sum which he is to be treated as having in his pocket forming part of the estate, because his estate owes something to his father's estate. You, his children, can receive no more under this will than your father Frederick would in fact have received, had he now been living and had it been he who was claiming his share and not you, his children."

Now the principle upon which the trustees would be entitled to set up a cross-claim against Frederick or his trustee in bankruptcy is stated by Lord Cottenham L.C. in *Cherry* v. *Boultbee*. (1) He is there referring to a case where the trustees of a will are in effect saying to a legatee: "Since you owe our testator something, we are entitled to set off that claim against your legacy," and he says: "It must be observed, that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so

(1) 4 My. & Cr. 442, 447.

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to be applied in payment of the debt, must be payable by the person entitled to receive the debt." The right of the trustees as against Frederick or his trustee in bankruptcy would be to say to him: "True we have a fund, part of which we have to pay to you, but out of that fund we propose to retain that which you owe to the estate; we shall take the fund and apply it in payment of the debt which you owe to the estate." But that right cannot, in my judgment, be set up as against the children of Frederick, because his children are entitled to say: "You have to pay us the amount of the share. It is perfectly true that, if it were our father who was claiming, you would have the right to apply his share in paying the debt he owed; but that is not a right which you can set up against us. What is given to us by the will is not the right to receive that which, in the circumstances, our father would ultimately have received after you had exercised your right to pay the debt out of the share; our right is to make you account to us for the share which he, our father, would have taken, if he were here to take it. He would, in the first instance, have taken the share. True, he would only have received the share after you had exercised your right to apply that which he takes in paying the debt which he owed." That seems to me to be the answer to the trustees' claim to set up, as against the children of Frederick, the right which they would have been entitled to set up against the father.

Now it is suggested that I am precluded from arriving at that conclusion by reason of a dictum of the Court of Appeal in *In re Scott* (1), which, though a dictum, embodies, if I may most respectfully venture to say so, well settled law. The point however is that the dictum does not, in my judgment, apply to the case with which I have to deal. The question in *In re Scott* (1) was whether a certain sum of 5000*l.* had or had not been received from the testator by his son John under such circumstances that it had to be treated as an advancement on account of John's portion of the estate, and the Appeal Court decided that it was not so to be treated. But at a stage of the case in which that question was still

(1) [1903] 1 Ch. 1.

undecided, the Court indicated the view that, if in fact the 5000*l.* had to be treated as an advancement which the son, had he been living, would have had to bring into hotchpot, the son's daughter, taking her parent's share, would not have been entitled to take that share, except on the same footing of bringing into hotchpot the 5000*l.* which her father had, on this hypothesis, received as an advancement. Vaughan Williams L.J. says (1): "I may as well say, although I do not think it is material for the decision of this appeal, that we cannot agree with the conclusion of the learned judge as to the position of John's daughter. We think it is plain that she could take only that which her father would have taken, and it is impossible to arrive at the conclusion that in the case of the father the result would have been different from that in the case of the daughter, who was to take an interest in the event of his death before the testator."

Now, I agree entirely that, if in the case now before me there had been an advancement to the testator's son Frederick and it had been necessary to ascertain what was the share of Frederick given, by reason of his death, to his children, his children would have had to treat that advancement as being something already paid on account of the share which they were entitled to claim. I am, however, of opinion that the case of an advancement differs fundamentally from the case of a debt or liability of the legatee to the testator's estate. The principle upon which an advancement is brought into hotchpot may be most conveniently stated by referring to what Lord Cottenham says in *Pym* v. *Lockyer* (2): "A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all

(1) [1903] 1 Ch. 9.

(2) (1841) 5 My. & Cr. 29, 46.

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ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced." James L.J. in *Fowkes* v. *Pascoe* (1) puts it in this way: "The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, on going out to establish himself in the world, or the like, it is to be presumed, as a presumptio juris et de jure, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot." Accordingly, in the case of an advancement, the share which the son takes under the will is the share which, had the advancement remained in the father's possession, the son would have been entitled to receive, less the advancement which has been transferred from the father's possession to the son's. The advancement is simply a bit of his share which he happens to have received before the testator dies, and the share of his father's estate which he takes on the father's death is therefore his proper distributive share of the whole of the father's estate taken for this purpose as including the advancement which he received before his father died; the amount which he has in fact received in advance being allocated and treated as received on account of his distributive share in the totality; and, accordingly, if under such words as I have to consider, the child of a deceased son is to take the share which his or her parent would have taken, if living, it seems to follow necessarily that, where the case is one of advancement, that child can only take the amount which the parent would have taken—namely, the share of the totality of the estate (including the advance) less the advance which the parent had already had in pocket; in other words, the share which passes under this will from the testator to the parent is diminished, and is a smaller thing than it would

(1) (1875) L. R. 10 Ch. 343, 350.

have been had the advancement not been made. Now compare that with the case where the legatee owes a debt to the estate which the trustees are entitled to pay out of that which they would otherwise pay to the legatee on account of his legacy. The legacy or share of residue has not been in any way diminished. The legatee takes his full legacy. He is only told that, before he receives it, the trustees are entitled to apply it as against him in a particular way, that is, in paying off the debt which he owes. In my judgment, for the reasons I have endeavoured to express, the analogy between advancement and the case where the legatee is a debtor does not hold good, and the law as laid down in the dictum in *In re Scott* (1) as applying to the case of advancement is perfectly reconcilable with the view which I venture to take of the legal position as applied to a case such as this, where it is a case merely of a right to apply a legatee's legacy in payment of his liability. When I have to find out what is the share that the parent would have taken, if living, I have to find out not what would have actually reached the parent, but what the amount is which the trustees would have had in their hands and which they would have had to pay to the parent subject only to their right to apply it in payment of the debt due to the estate. The practical result of that is that the share which Frederick's children take in the fund now distributable is a share which is not affected by the fact that, as against their father, the trustees would have been entitled to make certain deductions before paying him his share.

Solicitors: *Robbins, Olivey & Co., for Morgan, Wright & Wood, Bradford; Peter Thomas & Clark; Solicitor to the Board of Trade.*

[NOTE.—*Rose* v. *Rogers* (1870) 39 L. J. (Ch.) 791 was not cited, but appears to be an express authority for the view taken by Clauson J., the sum there in question being advanced by way of loan, and not being a payment by way of advancement.]

(1) [1903] 1 Ch. 1, 9.

H. C. H.

C. A. 1928 *Dec.* 11, 12, 20.

THE BOURNEMOUTH-SWANAGE MOTOR ROAD AND FERRY COMPANY *v.* HARVEY AND SONS.

[1927. B. 1923.]

Ferry—Exclusive or otherwise—Local Act—Construction—Arm of the Sea—Public Right to carry Passengers—Poole Harbour Act, 1914 (4 & 5 *Geo.* 5, *c. clv.*), *s.* 31—*Bournemouth-Swanage Motor Road and Ferry Act*, 1923 (13 & 14 *Geo.* 5, *c. lxxxviii.*), *ss.* 56, 62, 97.

By the Bournemouth-Swanage Motor Road and Ferry Act, 1923, the plaintiffs were empowered to make and maintain a motor road from South Haven Point in the parish of Studland in the county of Dorset to a public road leading from Studland to Swanage. By s. 56 of the Act they were empowered to establish maintain work and use a ferry service for passengers animals vehicles and goods between the Sandbanks and South Haven Point within Poole Harbour. By s. 62, passed for the protection of the Poole Harbour Commissioners, the plaintiffs were required to establish or acquire and thereafter continuously work the ferry by means of a vessel propelled by steam on a chain cable system, and by s. 62 and s. 97, passed for the benefit of certain landowners, they were required to provide from seven o'clock in the forenoon when summer time should be in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day a minimum hourly service of vessels from each shore. The two sections contained provisions enabling Poole Harbour Commissioners and the landowners respectively to exercise certain powers and rights in case the plaintiffs should cease working the ferry or fail to work it continuously and efficiently. They established a ferry service in accordance with these provisions :—

Held, by Scrutton and Sankey L.JJ., Greer L.J. dissenting, that the Act did not confer on the plaintiffs an exclusive right of ferry, and that they were not entitled to an injunction restraining the defendants, who for many years before the Act had in fact carried passengers between the Sandbanks and South Haven Point without claiming any franchise entitling them to do so, from carrying passengers bicycles and goods across the mouth of Poole Harbour within or near the limits of the plaintiffs' ferry.

Appeal from the decision of Romer J. on the hearing of the action.

The plaintiffs brought an action claiming (1.) a declaration that by virtue of the Bournemouth-Swanage Motor Road and Ferry Act, 1923, they were entitled to the exclusive right of ferry across the mouth of Poole Harbour in the county of Dorset between the Sandbanks and South Haven Point, and (2.) an injunction to restrain the defendants

their servants and agents from carrying passengers bicycles or goods across the mouth of Poole Harbour within or near the limits of the said ferry and from disturbing the plaintiffs in their enjoyment of the ferry.

On May 26, 1927, the plaintiffs served a notice of motion that the defendants should be restrained until the trial of the action from disturbing the plaintiffs' ferry. In support of the motion they filed an affidavit setting out the substance of s. 56 and s. 62, sub-ss. 1 and 10, of the Bournemouth-Swanage Motor Road and Ferry Act, 1923, whereby they were empowered to establish maintain and work a ferry service for passengers animals vehicles and goods between the points mentioned above and to charge three pence in respect of each foot passenger using the ferry ; and to purchase construct hire employ and work such vessels as they should deem necessary together with all proper appliances and conveniences including the laying down of chains cables and other apparatus along across or under Poole Harbour ; and were required to establish and thereafter continuously work a ferry between the said points, to be worked by a vessel propelled by steam on a chain cable system. So long as the ferry should be worked by the plaintiffs upon the terms and conditions thereinafter contained the Poole Harbour Commissioners were prohibited from purchasing taking or using any other ferry between the said points or permitting any other ferry service between them. And the plaintiffs were required to provide from seven o'clock in the forenoon when summer time is in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day a minimum hourly service of vessels from each shore.

The affidavit stated that since July, 1926, the plaintiffs' ferry had been in operation between the said points by means of a steam chain ferry vessel capable of carrying 300 passengers ; that the defendants owned or leased a pier known as Sandbanks Pier at North Haven Point from which they ran a service of three pleasure boats engaged in ferrying passengers from that pier to South Haven Point

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and landing them close by the junction of the plaintiffs' ferry and their motor road from South Haven Point to Studland.

In answer to this James Harvey filed an affidavit stating that in or about the year 1905 he purchased a house where he now lived a few hundred yards from Sandbanks Pier and in 1906 began running a steam launch service between the Sandbanks and South Haven Point and the Sandbanks and Studland and Poole Quay. About the year 1918 he bought for 400*l.* from a Mr. Poulain, the then proprietor the Haven Hotel, Sandbanks, two motor ferry boats and tenders which Poulain had been using for a ferry service between the Sandbanks and South Haven, having the right to embark and disembark passengers from Sandbanks Pier, as the pier belonged to and was used in connection with the hotel. In and after 1919 the defendants paid Poulain 75*l.* a year for the sole right of embarking and disembarking passengers from the pier. At some period unspecified they added two motor boats for the service at a cost of about 300*l.* each, and began running a service of four boats from 9 A.M. to 8 P.M. from May to September and a service of one boat from 9.30 A.M. to 4 P.M. in winter. In 1922 the defendants became yearly tenants of the pier at a rent of 120*l.* Since that year they used seven motor boats, four for the ferry service and others for excursions to Studland and elsewhere. Of the ferry boats one carries fifty-eight passengers, another thirty-two passengers, and the other two twelve passengers each. The passengers land or embark at South Haven as near to a certain old public way as possible. In a further affidavit James Harvey stated that the defendants charged 4*d.* in the summer and 6*d.* in winter for a return pass.

Upon this evidence Russell J. on June 21, 1927, granted an injunction until the hearing of the action restraining the defendants from disturbing the plaintiffs' ferry across Poole Harbour by running a service of motor boats between the Sandbanks and South Haven Point or otherwise disturbing the plaintiffs' said ferry between the said points. On July 18, 1928, the Court of Appeal discharged this order.

On the trial of the action before Romer J. the plaintiffs called evidence, the substance of which is set out in the judgment of Scrutton L.J. The defendants adduced no further evidence. They claimed no right to a franchise by grant from the Crown or Act of Parliament, or by prescription, or otherwise, nor any higher right than that of any of His Majesty's subjects to carry persons across an arm of the sea in boats at a reasonable charge, and contended that nothing short of an exclusive right would deprive them and others of this right or liberty which had for many years been enjoyed by the defendants themselves and numerous coastguards and fishermen as well; that the Bournemouth-Swanage Motor Road and Ferry Act, 1923 (1), did not confer on the plaintiffs an exclusive right of ferry, because generally an exclusive right is only conferred on condition that the grantee shall keep the ferry continuously open for the use of the public: *Letton* v. *Goodden* (2); *Simpson* v. *Attorney-General* (3); *Hammerton* v. *Dysart* (*Earl*) (4); there was no such condition imposed on the plaintiffs by the Act; moreover plain and unmistakable words—much less equivocal than those to be found in the Act—would be necessary in order to confer an exclusive right.

Romer J. dismissed the action.

The plaintiffs appealed.

Grant K.C. and *Elliot Gorst* for the appellants.

Lord Halsbury K.C., *Henry Johnston* and *W. R. Bisschop* for the respondents.

Cur. adv. vult.

Dec. 20. The following written judgments were delivered.

SCRUTTON L.J. The question in this appeal is whether the Bournemouth-Swanage Motor Road and Ferry Act, 1923, conferred on its promoters an exclusive right of ferry between two termini on either side of the entrance to Poole Harbour,

(1) The relevant sections of this Act and of the Poole Harbour Act, 1914, are set out in the note at the end of this report.

(2) (1866) L. R. 2 Eq. 123, 130.
(3) [1904] A. C. 476, 490.
(4) [1916] 1 A. C. 57, 103.

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so that persons, including the defendants, who had been in the habit before the Act was passed of conveying for reward foot passengers across the harbour entrance, could be stopped from continuing such transport without compensation.

Before the passing of the Act the position was this. There was a highway for all carriages and foot passengers down to Sandbanks on the Bournemouth or Eastern side of the harbour entrance. On the Swanage or Western side, there was no highway for vehicles leading to the shore. There was a wild and swampy stretch of land belonging to the Bankes family stretching for some miles to Studland. The parties at the trial admitted or agreed that before the Act there was a highway, presumably for foot passengers, from Studland to the harbour entrance. The parties were generously making admissions about rights over land which did not belong to them in the absence of the owner of that land, but I do not think it material to consider whether before the Act there was any kind of highway on the Swanage side. For it is clear that the Act intended to give power to the promoters to make such a highway. As to the harbour entrance there was to be a floating bridge worked by chains across the mouth of the harbour, with power to take regulated tolls. As to the land on the Swanage side, there was to be a motor road, with power to take tolls (except from foot passengers) for its use for sixty-five years, after which it was to become a public road. For both these purposes Parliamentary powers were necessary.

The position as to transport across the entrance of the harbour before the Act was this. There was a ferry house on the Bankes land, in which a man lived who for many years did ferry across the harbour mouth. In 1785, Henry Bankes, Lord of the Manor of Studland, granted to one Hart "all that messuage being a common alehouse together with the ferry or passage thereunto belonging known by the name of South Haven Passage House and Passage for 99 years" for three lives named therein and then aged respectively 35, $5\frac{3}{4}$ and $4\frac{1}{4}$ years, at a rent of 30*s.* per annum. This lease obviously expired long before the ninety-nine years

were up, and there was some evidence of leases and yearly tenancies under the Bankes Estate up to 1887, when the Passage House was pulled down, and any ferrying by the Bankes Estate stopped, except that they gave permission for a nominal payment to the defendants to land passengers on the Bankes foreshore: see Mr. Bennett's speech, Document 32, p. 21. Various fishermen and coastguards used to ferry across for reward as and when they liked. The evidence as to the defendants' actions was in rather a curious position. Before Russell J. on the original motion they filed an affidavit stating the manner and time for which they had ferried for reward. At the trial before Romer J. their counsel elected to call no evidence, and informed us that he thought he could prove no right to ferry. I took the view that the facts that the plaintiffs' construction of the Act would prevent people from doing what they had before the Act done for reward without hindrance so long as they retained their rights of landing on either shore, and that the Act would alter their position to their prejudice without compensation, were matter to be considered in the construction of the Act. The Courts construe private Acts on a presumption that people should not be prejudiced in matters they can lawfully perform without compensation, unless that intention is clearly expressed. One of the many authorities to that effect is the language of Lord Atkinson in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (1): "An intention to take away the property of a subject without giving to him a legal right of compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." I was therefore desirous of knowing what the defendants were doing before the passing of the Act. Fortunately it appeared that counsel for the plaintiffs in his opening speech had informed the judge, as follows: "The position of the defendant is as follows. He is a gentleman who owns various motor boats, and undoubtedly for some years before the passing of this Act of 1923, a good many years before, had been in the habit of conveying

(1) [1919] A. C. 744, 752.

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passengers across the entrance to Poole Harbour and landing them on the foreshore on the other side, and for that he had paid an annual sum to the Bankes Estate as owners of the foreshore, and he says in his affidavit he paid them that annual sum, a nominal sum, for the purpose of being allowed to keep the landing stage on the Bankes foreshore."

Mr. Grant for the plaintiffs before us protested with his usual vigour that this was not evidence that we could consider. It seems to me clear that we can and that Mr. Bennett put the affidavit in from which he quoted. It appeared from it that the defendants had a service of some four motor boats, since 1915, and had been running boats since 1907, on which and on pier landing rights acquired from the representatives of a gentleman who in 1897 obtained a Provisional Order for a landing pier at Sandbanks, still existing, he had spent a considerable sum of money.

The other persons who might be interested in the matter were the Poole Harbour Commissioners who, by Act of Parliament in 1914, were authorized to establish a ferry between Sandbanks and South Haven Point. The preamble to that Act recites: "And whereas it is expedient that the Commissioners should be authorized to establish a ferry between the Sandbanks and South Haven Point and in the event of any franchise or right of ferry being found to exist between such points to acquire such franchise or right (if any) from the owner or owners thereof, and that power should be conferred upon the Commissioners as in this Act contained with respect to ferries."

The reference to franchise or right of ferry is to the possibility of the Bankes Estate having a franchise ferry. Sect. 31 empowered the Commissioners to purchase compulsorily or by agreement "any franchise or right (if any) of ferry between the Sandbanks and South Haven Point," with a proviso: "Provided always that the Commissioners shall not under this Act establish any new ferry or ferries unless and until they shall have acquired any franchise or right (if any) of ferry which any such new ferry would interfere with or prejudicially affect: Provided also that nothing in this Act

shall recognize or confirm any title right or claim to any existing or other ferry across the Harbour as an ancient ferry." Sect. 39, sub-ss. 4 and 5, contained provisions regulating the relations of the Bankes Estate in respect of their "reputed ferry" with the Commissioners. They had also power to make by-laws controlling any ferry within the limits of the harbour.

In 1923 certain promoters desired to establish a ferry for carriages across the entrance of the harbour in the shape of a floating bridge with chains, and a carriage or motor road from the Western shore of the entrance to the carriage highway at Studland. These were quite new facilities, for which Parliamentary authority was obviously necessary. They had to deal with existing persons or corporations interested in the locus in quo and its ferry services. They dealt with the Poole Commissioners by s. 62, and with the Bankes Settled Estates by s. 97. Each of these sections begins with the formula: "unless otherwise agreed between the Company and the" owners or Commissioners. This formula, according to the judgments of the Court of Appeal in *Attorney-General* v. *North Eastern Ry. Co.* (1), is the regular and proper way of allowing the persons for whose benefit the section is inserted to dispense with the provisions of the section: see per Lord Cozens-Hardy M.R. (2) and Phillimore L.J. (3)

The clause for the protection of the Poole Harbour Commissioners binds the Company continuously to work a ferry, in consideration of which the Commissioners will not purchase or establish any other ferry. It deals with the minimum hours of working of the ferry, and gives the Commissioners power to acquire the undertaking and vessels if the companies do not work them. The very elaborate clause for the protection of the Bankes Settled Estates contains the following sub-clauses: "(9.) Subject to the provisions of this Act the Company shall within four years after the passing of this Act establish or acquire and thereafter continuously work a ferry between the Sandbanks and South Haven Point and so

(1) [1915] 1 Ch. 905. (2) [1915] 1 Ch. 914.
(3) [1915] 1 Ch. 917, 918.

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long as such ferry shall be worked by the Company upon the terms and conditions hereinafter in this section contained the owners shall not carry on a ferry between the Sandbanks and South Haven Point or after the passing of this Act grant any consent to the carrying on of any other ferry between such points."

Sub-cl. 10 is: "The Company shall provide from seven o'clock in the forenoon when summer time is in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day and at stated times a minimum hourly service of vessels from each shore." Sub-cl. 11 is: "The Company shall continually and efficiently work the ferry unless at any time they are prevented from so doing by any accident or damage to the vessel or vessels or the machinery works or gear connected therewith or by force majeure or by any strike, lock-out, civil commotion or other cause beyond their control but the liability of the Company to continually and efficiently work the ferry shall only cease during such period or periods as is or are necessary to repair or renew the vessel or the machinery works or gear connected therewith or for so long as any such force majeure lock-out or other cause beyond the control of the Company shall continue." Sub-cl. 14 is: "Nothing in this Act shall prejudice limit or in any way affect any ferry franchise of the owners or prevent their carrying on and working any such ferry except as in this section hereinbefore expressly provided." Sub-cl. 15 is: "If from any cause other than those referred to in sub-section (11.) of this section the Company having established and commenced to work a ferry between the Sandbanks and South Haven Point should fail to continue to efficiently work such ferry then the owners shall be at liberty to exercise any ferry franchise they may possess between such points."

Apparently, as stated in *Attorney-General* v. *North Eastern Ry. Co.* (1), the Bankes Estates or the Poole Harbour Commissioners may by agreement with the company relieve them of any obligation to perform any of the provisions in

(1) [1915] 1 Ch. 905.

these ss. 62 and 97. For the protection of the public, or the prohibition of persons such as the defendants ferrying for hire up to the passing of the Act, one must look to other provisions. The foundation of the plaintiffs' case against the public, or other ferrymen, is said to rest on ss. 56 and 57.

Sect. 56 empowers the Company to establish maintain work and use a ferry service for passengers animals vehicles and goods. They argue that these words are equivalent to a Parliamentary grant of a franchise ferry. The legal effect of such a grant is considered by the House of Lords in *Hammerton* v. *Dysart* (*Earl*) (1), especially by Lord Sumner at p. 103. It is stated by Lord Macnaghten in *Simpson* v. *Attorney-General* (2) thus: "All ancient ferries have their origin in Royal grant or in prescription, which presumes a Royal grant. A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across but the owner of the ferry. No one may disturb the ferry. The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound to have his ferry always ready."

Kindersley V.-C. in *Letton* v. *Goodden* (3) describes it thus "A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side; and as such the existence of a ferry is obviously for the benefit of the public. The advantage to the public is so great that the Crown has from time to time granted rights of ferry, and all common ferries have their origin in Royal grant, or in prescription, which presumes such grant. Such a right of ferry is an exclusive right or monopoly, and, as such, it is in itself an evil, being in derogation of common right, for by common right any person may carry passengers across a river.

(1) [1916] 1 A. C. 57. (2) [1904] A. C. 476, 490.
(3) (1866) L. R. 2 Eq. 123, 130.

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But as a compensation for that derogation of common right, there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the King's highway, of which the ferry forms a part; for the owner of the ferry is under the obligation of always providing proper boats, with competent boatmen, and all other things necessary for the maintenance of the ferry in an efficient state and condition for the use of the public; and this he is bound to do under pain of indictment; and if he be found in default, he would, as it is expressed, be liable to be grievously amerced."

As by common right at the passing of this Act every person had a right to cross this entrance on his way from Sandbanks to Studland, and by common right any person could carry passengers across the entrance for hire and was doing so, any supposed grant of an exclusive right to ferry, which would be in derogation of common right, must be strictly proved, and extended no further than is necessary for the purposes of the grant. If the appellants are right in their claim to an exclusive right to ferry foot passengers, they have inserted in their clauses for the protection of the Poole Commissioners and the Bankes Estate provisions that they need only run, in summer time from 7 A.M. to an hour after sunset, at other times from 8 A.M. to an hour after sunset, an hourly service. That is to say that at midsummer for nine hours, at Christmas for fifteen hours, and at Easter for twelve hours, there will be no service at all, and any person ferrying a foot passenger over during those hours will infringe the Company's exclusive rights of ferrying, although the foot passenger may use the Company's motor road toll free (s. 51). This is very unlike Lord Macnaghten's "the owner of the ferry is bound to have his ferry always ready," or Kindersley V.-C.'s "obligation of always providing proper boats." And even this minimum obligation may be altered by agreement between the Company, and the Commissioners or the Bankes Estate, and apparently the public cannot complain. Parliament was faced with a position in which two existing bodies might have rights of

ferry: the Commissioners and the Bankes Estates. It abstained from expressing any opinion whether they had those rights or not: s. 57, sub-s. 2. It gave the Company power to "purchase any franchise or right of ferry (if any)": s. 57, sub-s. 1. The Commissioners agreed that they would not use these rights of ferry, if the Company worked their ferry as agreed: s. 62, sub-s. 1; but had powers of purchase if the Company did not work: s. 62, sub-s. 19. The Bankes Estate by agreement embodied in the statute were not bound to prevent other ferries, but only not to "grant any consent" or themselves to carry on any ferry, so long as the Company continued efficiently to carry on their ferry. There is no express clause in the Act prohibiting persons who had been ferrying for hire at the passing of the Act, or indeed any one, from ferrying passengers and their bicycles across.

These being the provisions of the Act, and the subject matter to which it is to be applied, I approach the matter from the position that clear and unequivocal words are necessary to derogate from common right, to deprive people of the power to do what they were doing for profit at the passing of the Act, without any one being able to stop them, and to establish an exclusive right to ferry without providing a continuous service of ferry, and, like Romer J., whose judgment I refer to but do not repeat, I do not find such words. I think the Act is sufficiently explained by the facts that there were no facilities for transit of carriages, motors and charabancs from Sandbanks to Studland and Swanage, that a floating bridge with chains and special landing stages were necessary at the harbour mouth, and a motor road on the Studland side, and that the Company wanted and got Parliamentary powers for these purposes. It is not necessary to consider whether the Company got any exclusive right of ferry confined to vehicles; it is enough that it is very improbable that any one else will get Parliamentary powers for a chain bridge and landing places, or another road. The practical monopoly seems to me sufficient, without excluding others from carrying foot passengers, as they were doing before the Act, especially as the Company have no power

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to charge such passengers tolls for the use of the motor road.

Great reliance was placed on the judgment of Parke B. in 1848 in the case of *North and South Shields Ferry Co.* v. *Barker*. (1) The language of the Act there was that it was lawful for the Company "to establish keep and maintain a ferry," but there was also an express provision, s. 85, that no other ferry should be set up and used across the Tyne within certain limits. Parke B. on p. 148 seems to think that s. 85 was superfluous, as the exclusive right of a franchise ferry was given by ss. 1 and 2. But whatever may be the case in that Act, I am unable to think that the present Act contains any grant of an exclusive right of ferry for the foot passengers and bicyclists who were using the defendants' and other boats before the passing of the Act, and people of their class.

I agree with the judgment of Romer J. and his reasoning, and think the appeal should be dismissed with costs.

GREER L.J. The appellants in this case are a company incorporated by a private Act of Parliament (13 & 14 Geo. 5, c. lxxxviii.), whereby they were given power to construct a motor road to provide a more direct means of communication between Bournemouth and Swanage, and a ferry across Poole Harbour between Sandbanks and South Haven Point, the ferry being intended to carry passengers and goods from a highway coming from Bournemouth on the North side of the mouth of the harbour to the new motor road which was to run on the South side of the harbour and connect up with a highway running to Swanage. For convenience I shall refer to this Act as the Bournemouth Act.

The Company maintain that the Bournemouth Act gave them an exclusive right of ferry similar to a ferry franchise at common law, and in the action in respect of which this appeal arises they alleged that the defendants had wrongfully disturbed the Company in the possession and enjoyment of the said ferry by carrying foot passengers and bicycles for hire

(1) (1848) 2 Ex. 136.

between the said points, and they claimed a declaration that they were entitled to the exclusive right of ferry between the said points, an injunction to restrain the defendants their servants and agents from carrying passengers bicycles or goods across the mouth of Poole Harbour within or near the limits of the said ferry, and from disturbance in any way in their enjoyment of the said ferry, and an inquiry as to damages. By their defence the defendants admitted that they are carrying and have for twenty-two years past continuously carried by steam or motor boats foot passengers and bicycles for hire between the said points.

In opening the case for the plaintiffs (the present appellants), Mr. Bennett, their counsel, admitted that the defendants had undoubtedly for some years before the passing of the Act of 1923, a good many years before, been in the habit of conveying passengers across the entrance of Poole Harbour and landing them on the other side. It seems to me therefore to be common ground in this case, first that the defendants have done acts which would be a breach of the rights of the plaintiffs if the plaintiffs have an exclusive right of ferry, and that the defendants have only been continuing, since the Bournemouth Act was passed, what they had been doing for many years before. The sole question in this appeal is whether Romer J. was right in holding that the plaintiffs had not acquired an exclusive right of ferry by reason of the powers conferred on them by the Bournemouth Act.

In order to consider the proper construction of the Bournemouth Act it is necessary to mention that the owners of the land abutting on the harbour, the Bankes Trustees, claimed that they were the owners of a common law ferry franchise between the points in question, and that certain powers had been given to the Poole Harbour Commissioners by an Act of 1914 (4 & 5 Geo. 5, c. clv.). In order rightly to understand the Bournemouth Act of 1923, it is necessary to consider the Poole Harbour Act of 1914 so far as it deals with the establishment of a ferry between the points in question. This last mentioned Act, which for convenience may be called the Poole Act, contains the following recital:

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"And whereas it is expedient that the Commissioners should be authorized to establish a ferry between the Sandbanks and South Haven Points and in the event of any franchise or right of ferry being found to exist between such points to acquire such franchise or right (if any) from the owner or owners thereof and that power should be conferred upon the Commissioners as in this Act contained with respect to ferries." The substantive parts of the Poole Act contain certain provisions which in my judgment show that the powers given to the Commissioners to establish a ferry within the harbour were intended to include power to establish not merely a ferry service, but a ferry which would be exclusive to the same extent as a ferry franchise granted by the Crown is exclusive. Sect. 31 gives the Commissioners power to take and use compulsorily or by agreement any franchise or right of ferry, if any, between Sandbanks and South Haven Point, and to establish a new ferry or new ferries in substitution for or in addition to any existing ferry, but prohibits them from establishing any new ferry "unless and until they shall have acquired any franchise or right (if any) of ferry which any such new ferry would interfere with or prejudicially affect." The section also empowers the Commissioners when they have established a ferry or ferries to lease the same or grant licences to boatmen and others to work the same. Sect. 32 gives them power to demand tolls for the use of any ferry purchased or established by them. By s. 39, sub-s. 4, it is provided that if the owners should be willing to grant the Commissioners a lease of the ferries reputed to belong to them between Sandbanks and South Haven Point the Commissioners should not exercise their compulsory powers.

I cannot read these sections in any other way than as meaning that any ferry to be established between the points in question is to be a ferry with the same exclusive rights as those which would belong to the owner of a franchise. The power to lease any ferry so established, or grant licences, seems to me much more appropriate to a lease of or licence to exercise ferry rights than to a mere lease of boats or landing stages, or a licence to use the same. In my judgment the use

of these words indicates that the body granting the lease or licence is possessed of ferry rights in excess of those possessed by any member of the community, that is to say of exclusive rights which they may dispose of by lease or licence. If the Commissioners were not granted exclusive rights no licence would be required to enable any one to work the ferry, but only a licence to use the landing stages or other works or conveniences. I think it is clear that the lease or licence referred to in s. 31, sub-s. 4, is a lease or licence of ferry rights, and this affords strong grounds for concluding that once a ferry is established under the Poole Act it would be an exclusive ferry.

By the Bournemouth Act the plaintiff Company were incorporated and given powers to make a motor road on the South side of the harbour connecting land belonging to the Bankes Trustees with an existing road leading to Swanage, and a ferry between Sandbanks and South Haven Point. The effect of this would be to make a continuous highway between Bournemouth and Swanage for foot passengers and vehicles. In the definition section, s. 3, the Act provides that the words "the ferry" are to mean the service of ferry vessels, but there is no definition of the word "ferry" by itself, or of the words "a ferry." Foot passengers are entitled to use the road free of toll, but the Act established a toll for vehicles and foot passengers using the ferry, and a separate toll for vehicles using the motor road. By s. 56 it was provided that the Company, subject to the provisions of the Act, might establish maintain work and use a ferry service for passengers, animals, vehicles, and goods between the said points. By s. 57, sub-s. 1, the Company were given powers by agreement to purchase and use any franchise or right of ferry, if any, between the said points, and by sub-s. 2 it was provided that the Company and the Harbour Commissioners might enter into and carry into effect agreements for the lease to or working by the Company of any ferry or ferries of the Commissioners or the rights of the Commissioners to establish any such ferry or ferries. Sect. 62 contains a number of provisions which are to have effect

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unless otherwise agreed in writing between the Company and the Commissioners. Sub-s. 1 provides that subject to the provisions of the Act the Company should establish or acquire and thereafter continuously work a ferry between the said points and that so long as the ferry so established or acquired should be worked by the Company upon the terms contained in the section, the Commissioners should not under the powers, rights, and privileges conferred on them by the Poole Harbour Act or otherwise, either purchase, take, or use any other ferry between the said points, or establish a new ferry between the said points. Sub-s. 10 provides that the Company should provide from 7 o'clock in the forenoon, when summer time is in force, and from 8 o'clock in the forenoon at all other times in the year, until one hour after sunset on every day, and at stated times, a minimum hourly service of vessels from each shore.

A good deal of the argument in this case turned on sub-s. 19, which reads as follows: "If at any time after the Company shall have commenced to work the ferry they shall cease to work the same for a period of one calendar month (except as provided by sub-s. 11 of this section) the Commissioners may at any time thereafter serve upon the Company one month's notice in writing requiring them to sell to the Commissioners so much of the undertaking of the Company as relates to the ferry (including all such vessels landing stages buildings equipment and property as may have been employed by the Company in connection therewith), and as from the expiration of the said notice the Company shall sell and the Commissioners shall purchase such part of the undertaking upon terms of paying the then value of such part of the undertaking (exclusive of any allowance for past or future profits or any compensation for compulsory purchase or of goodwill or of any similar considerations) such value to be in case of difference determined by arbitration and as from the expiration of the said notice the Commissioners may work and use such vessels landing stages buildings equipment and property, and the provisions of the Poole

Harbour Act, 1914, shall extend and apply in respect thereof as if the same were a ferry purchased or established by the Commissioners under that Act."

In my judgment the effect of s. 62 is to establish a statutory agreement between the Poole Commissioners and the plaintiff Company as to the terms on which the Company are to be permitted to use the ferry rights between the Sandbanks and South Haven Point which are conferred on the Commissioners by the Poole Act. If, as I think is the case, the rights and duties of the Company arise out of a statutory agreement there is nothing to cause surprise when we find such provisions as those in sub-s. 19 enabling the Poole Commissioners in certain events to buy out the Company, and to use their landing stages and vessels for the purpose of working the ferry, as if they had established it under the Poole Act. It is also to be observed that sub-s. 1 of s. 62 treats a ferry established by the Company and a ferry acquired as on the same basis. And as a ferry acquired from the Poole Commissioners, or from the Bankes Trustees (if they had ferry rights), would be an exclusive ferry, it is reasonable to suppose that a ferry established by the Company is also intended to be an exclusive ferry.

Sect. 97 contained a number of provisions for the protection of the Bankes Settled Estates, to two of which it is necessary to refer, sub-ss. 9 and 14. "(9.) Subject to the provisions of this Act the Company shall within four years after the passing of this Act establish or acquire and thereafter continuously work a ferry between the Sandbanks and South Haven Point and so long as such ferry shall be worked by the Company upon the terms and conditions hereinafter in this section contained the owners shall not carry on a ferry between the Sandbanks and South Haven Point or after the passing of this Act grant any consent to the carrying on of any other ferry between such points." "(14.) Nothing in this Act shall prejudice limit or in any way affect any ferry franchise of the owners or prevent their carrying on and working any such ferry except as in this section hereinbefore expressly provided."

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These sub-sections seem to me to strongly support the view that the Legislature thought they were granting to the Company ferry rights which when the ferry was established would be equivalent to a ferry franchise if such existed, and that such ferry franchise though not extinguished should be in abeyance so long as the Company should be exercising their equivalent statutory ferry rights. Having regard to the significant fact that if the Company establish and work their ferry the Act has the effect of keeping in abeyance for the time being the statutory rights of the Commissioners to establish an exclusive ferry between the said points, and the right, if any, of the owners to exercise franchise ferry rights between the two points, it seems to me that the true intent and meaning of the statute is that the Company are to have not merely rights to run a service of ferry vessels such as any member of the public would have if he could secure landing places on each side and could work his vessels without unlawful interference with the harbour, and that if they established a ferry service they were given ferry rights, that is to say, rights similar to those which are conferred by a grant of a ferry franchise from the Crown. The statute imposes upon them burdens which any member of the public carrying on a ferry service without a franchise is not subject to. They are bound to carry any passenger ready to pay the toll on the boats which ply at stated times. They are also bound to a similar service in respect of vehicles. They cannot, as a ferryman not subject to the burdens of a ferry franchise can, charge anything they please. It is quite true that the Act has regulated and restricted their privileges and burdens, but it does not follow from this that the Act is not to be construed as doing for them what the grant of a franchise does for those who accept the burdens of that franchise.

Looking at the statute, apart from the authority of any decided cases, I should come to the conclusion that in granting to the Company the right to establish and run a ferry, the Act of Parliament meant to give to the Company exclusive rights in return for the burdens that it imposed upon them, but the question is not entirely free from

authority. In *North and South Shields Ferry Co.* v. *Barker* (1) it was held by the Court of Exchequer that the powers conferred by a private Act of Parliament (10 Geo. 4, c. xcviii.) on the plaintiff company to establish, keep, and maintain a ferry for the passage of horses, carriages, etc., and foot passengers over the River Tyne, and to purchase any existing ferry from the owners, gave the company the same right under the statute as the franchise of a ferry, which would entitle them to bring an action against any one who infringed their right, which is in the nature of a monopoly, by carrying persons, who otherwise presumably would have gone by the ferry, to or from the same place. It is to be observed that the statute gave power to the company to make by-laws for regulating the commencement, continuance, suspension, cessation, time and order of the passing and re-passing of the boats, barges, or other vessels to be employed in such ferry (see the section); and in this respect the ferry would differ as much from the ordinary franchise ferry as the ferry established by the plaintiffs did by reason of the provisions of their Act. The decision of the Court of Exchequer in that case in my judgment strongly supports the construction of the statute in the present case, which has commended itself to me for reasons based on the wording of the Act. I think the decision in the case of *Letton* v. *Goodden* (2) has no bearing on the present case, as the statute in that case giving power to appoint watermen to ply on Sundays between certain places does not anywhere call the right of plying between those places a ferry. The penalty for interference with the watermen was specially provided for by s. 40 of the Act, and the decision of Kindersley V.-C. turned on the peculiar facts of that case, and especially on the ground that there was no obligation on the plaintiff to provide boats or boatmen for the convenience of the public. In the present case there is an obligation, at any rate so long as the plaintiffs maintain the ferry, to run an hourly service at stated times during the day-time, and to carry passengers and goods that are presented for carriage on their vessels

(1) 2 Ex. 136. (2) L. R. 2 Eq. 123.

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at a charge of not more than the tolls provided for by the statute. In my judgment this affords a sufficient consideration to the public for the exclusive privilege which I think is given by the Act of Parliament.

It is argued that this construction of the two statutes ought not to be adopted, as it would involve interference with the goodwill of the defendants, who had carried on the business of carrying foot passengers and vehicles between the two points for a long time, and it ought to be presumed that Parliament would not interfere with such an established business without compensation. But the defendants' exercise of their rights appears to have depended in the first instance on the consent of the Bankes Trustees, whose interests were protected by the Bournemouth Act. In any case in which a ferry right is established there is necessarily involved an interference with the existing rights of each member of the public, but it may well be that the Legislature may think fit to restrict the rights of the public in return for benefits conferred on the public by a more regular and efficient service.

There is a well known canon of construction applicable to private Acts of Parliament that if the words used by the statute are ambiguous, the meaning that is most favourable to the public should be adopted: *Stourbridge Canal Co.* v. *Wheeley* (1) and per Tindal C.J. in *Parker* v. *Great Western Ry. Co.* (2); but I do not think that this has the effect of preventing the Court from saying that if, when the whole of the statute in question is considered, it appears by necessary intendment that the privilege claimed was intended to be granted, the Court should refuse to draw this inference because the Act does not contain express words creating the privilege claimed. In my judgment it is impossible to read the Poole Act without seeing that what the Legislature is granting is power to acquire by purchase an exclusive ferry, if such a ferry exists, or alternatively to establish one if it does not exist, and it seems to me that the powers which are given by the Bournemouth Act include the power to the

(1) (1831) 2 B. & Ad. 792, 793. (2) (1844) 7 M. & G. 253, 288.

Company to take and use by agreement the exclusive rights of ferry granted by the Poole Act to the Harbour Commissioners.

For these reasons I think that the construction of the statute adopted by Russell J. on the hearing of the interlocutory application was right, and the contrary view adopted by Romer J. on the trial of the action was wrong. The appeal should, in my judgment, be allowed, a declaration and injunction granted as prayed, an inquiry as to damages, if the plaintiffs desire to have such an inquiry, ordered, and the counterclaim should be dismissed with costs.

SANKEY L.J. The plaintiffs in this case sued for a declaration that they are entitled to an exclusive right of ferry across Poole Harbour between the Sandbanks and South Haven Point, and for an injunction to restrain the defendants from disturbing them in the enjoyment of the ferry. It must, I think, be taken that there is a highway coming down to the two points in question, and the learned counsel for the plaintiffs in opening his case said: "The position of the defendants is as follows: They are gentlemen who own various motor-boats, and undoubtedly for some years before the passing of the Bournemouth-Swanage Motor Road and Ferry Act, 1923, a good many years before, had been in the habit of conveying passengers across the entrance to Poole Harbour and landing them on the other side, and for that they had paid an annual sum to the Bankes Estate as owners of the foreshore and they say in their affidavit they paid them that annual sum, a nominal sum, for the purpose of being allowed to keep the landing stage on the Bankes foreshore."

Evidence was led for the plaintiffs, but, in view of the above admissions, no witnesses were called for the defendants, and after hearing argument the learned judge gave judgment for the defendants, from which judgment the present appeal is brought.

A ferry has been described as a monopoly, not granted for the benefit of the ferry owner alone, but for the benefit of

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the public, so that the public may be certain of finding the means of transport across a river, and that in return for the monopoly the ferry owner must give attendance at due times, keep a boat in proper order and take but reasonable toll: see Halsbury's Laws of England, vol. xiv., p. 558, quoting Hale, de Jure Maris, Part I., ch. 2.

A ferry may be created by Royal grant, or in modern days by an Act of Parliament. An example of the former will be found in *Pim* v. *Curell* (1) and an example of the latter in *North and South Shields Ferry Co.* v. *Barker*. (2)

The law as to the duties and liabilities of ferrymen has recently been exhaustively considered in the judgments of Lord Parker and Lord Sumner in *Hammerton* v. *Dysart* (*Earl*) (3), where Lord Sumner says: "The consideration for the right of the grantee of a ferry is his assumption of a perpetual obligation towards the public. He is and must remain a servant of the public. 'Neglect does not, ipso facto, destroy the right to the franchise. The proceeding by quo warranto supposes the party in actual, though not in legal possession, and therefore judgment of ouster is necessary to dispossess him. In the case of an abuse of a franchise by negligence the Crown may repeal the grant by scire facias or quo warranto and may vest it in some other person': *Peter* v. *Kendal* (4), per Bayley J. At all reasonable times the ferryman must be prepared to ferry those who wish to be ferried. He must be provided with a reasonable and sufficient number of men and craft. He must charge only reasonable and uniform tolls. He must carry all peaceable wayfarers who are ready and willing to pay his toll. I know of no right in him to question them whence they come or whither they go, or to discriminate between one person and another who uses the King's highway. He cannot abandon his franchise because it is becoming less profitable or reduce his burthens by restricting his service. He cannot, without the Royal licence, erect a bridge in lieu of the ferry and thereupon give the ferry up: *Paine* v.

(1) (1840) 6 M. & W. 234.
(2) 2 Ex. 136.
(3) [1916] 1 A. C. 57, 102.
(4) (1827) 6 B. & C. 703, 710.

Partrich. (1) He commits an indictable misdemeanour if he neglects his ferry."

In the present case the plaintiffs claim that their Act of Parliament gives them an exclusive right of ferry, and the real point for determination is whether, under the circumstances, on a true construction of the Act of Parliament the plaintiffs have obtained an exclusive right of ferry at the spot in question. In approaching the consideration of the Act it is necessary in my view to set out the canons of construction of such a statute. In *Scales* v. *Pickering* (2) Best C.J. says: "If the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property." In *Parker* v. *Great Western Ry. Co.* (3) Tindal C.J. says: "The language of these Acts of Parliament is to be treated as the language of the promoters of them: they ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." "If there be any reasonable doubt," said Lord Cottenham L.C. in *Webb* v. *Manchester and Leeds Ry. Co.* (4), "as to the extent of their powers," (given to the railway company in their private Act) "they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament." In *Stourbridge Canal Co.* v. *Wheeley* (5) the plaintiffs' canal had been made under 16 Geo. 3, c. 28, and an action was brought to recover compensation from the defendants for using the plaintiffs' canal in a manner not strictly contemplated in their Act. In deciding against the plaintiffs' claim Lord Tenterden said as follows: "The canal having been made under the provisions of an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases

(1) (1690) Carthew, 191.
(2) (1828) 4 Bing. 448, 452.
(3) (1844) 7 Scott, N. R. 835, 870.
(4) (1839) 4 My. & Cr. 116, 120.
(5) 2 B. & Ad. 792, 793.

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is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act." In the case of *Scottish Drainage Co.* v. *Campbell* (1) Lord Herschell said: "When an Act of this description is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinized, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used." These and other cases are conveniently set out in Craies on Statute Law, 3rd ed., p. 475, and may be supplemented generally by the remarks made by Lord Atkinson in *Central Control Board* v. *Cannon Brewery* (2), where he says: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right of compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms."

Looking at this Act generally, I cannot help thinking that its main object was to construct a motor road from Bournemouth to Swanage with a ferry over the place in question as incidental to and necessary for the road. It is true that by s. 35 the plaintiff company has to keep separate accounts of the motor road and ferry, but their exclusive rights on the road are to cease in certain events, and after a certain time: see s. 55.

There was vague evidence of a franchise ferry having existed at the spot in question, and by the Poole Harbour Act, 1914, certain rights had been given to the Commissioners under that Act to make a ferry; but apparently the Legislature in 1923 desired, when granting whatever rights they did grant to the plaintiffs, to maintain the status quo, for by s. 62 provisions were inserted for the protection of the Poole Harbour Commissioners, and by s. 97 provisions for the protection of the Bankes Settled Estate.

(1) (1889) 14 App. Cas. 139, 142. (2) [1919] A. C. 744, 752.

The grant of the ferry is given by s. 56 of the Act: "Subject to the provisions of this Act, the Company may establish maintain work and use a ferry service for passengers animals vehicles and goods between the Sandbanks and South Haven Point within the Harbour and may for that purpose purchase construct hire and provide employ maintain use work and sell or lease such vessels as they may deem necessary together with all proper appliances and conveniences including the laying down and maintaining of chains cables and other apparatus along across over or under the Harbour." There are no express words giving an exclusive right to the plaintiffs. It will be observed that the Company is given power to establish, maintain, work and use a ferry service. The plaintiffs say that that clause confers upon them a franchise ferry, or alternatively that, according to the true construction of the Act, the clause confers upon them a right of ferrying which, if not in all respects equivalent to a ferry, is an exclusive right of ferrying for this entrance to Poole Harbour.

I doubt, as the learned judge did, whether the Legislature did think by s. 56 that it had conferred a franchise ferry upon the plaintiffs, because it is incredible that the Legislature should confer upon them a franchise ferry if there were a franchise ferry already there in existence, and, as above stated, it appears that the Legislature desired to maintain the status quo, having regard to the protective clauses. Further, in construing the Act of Parliament, I think it is necessary to see, upon the question whether an exclusive right to the plaintiffs was given, what the obligations placed upon them were. The ferry service appears to give very meagre rights to the public, and it is pertinent to ask what does the ferryman do for his monopoly. Further, it is to be observed that the ferryman can, if he is so minded, by neglect extinguish his obligation to ferry, because if he ceases to perform his duties the Poole Harbour Commissioners are entitled under s. 62, sub-s. 19, to oust him from his position, subject, of course, to compensation. This seems to me to negative the idea that an exclusive right of ferry was given to the plaintiffs. Looking at the whole Act I have come

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to the conclusion that its real and main object was to empower the plaintiffs to make a motor road from Bournemouth to Swanage, and for that purpose to give the right of transporting motor cars and incidentally persons who desired to cross from one point to the other, by means of the ferry. This undoubtedly gives them valuable rights, for they are able to put chains across the mouth of the harbour for the purpose of working the ferry boat; but I do not think that the Act gives them power to exclude persons like the defendants from taking over passengers, as they have been doing for so many years.

In my opinion the plaintiffs have failed to prove their case, and I think the judgment of the learned judge should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*

Solicitors for respondents: *Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton.*

NOTE.

The Poole Harbour Act, 1914 (4 & 5 Geo. 5, c. clv.), after reciting that the Poole Harbour Commissioners (hereinafter called "the Commissioners") had been incorporated by the Poole Harbour Act, 1895, and that it was expedient that the Commissioners should be authorized to establish a ferry between the Sandbanks and South Haven Point and in the event of any franchise or right of ferry being found to exist between such points to acquire such franchise or right (if any) from the owner or owners thereof and that power should be conferred upon the Commissioners with respect to ferries, enacted among other provisions as follows:—

"Sect. 31. The Commissioners may—

(1.) Purchase take and use compulsorily or by agreement any franchise or right (if any) of ferry between the Sandbanks and South Haven Point within the Harbour and any property (real and personal) rights powers and privileges held or enjoyed by the owner or owners of such franchise or right (if any) of ferry for the purposes thereof and the provisions of the Lands Clauses Acts incorporated with this Act shall so far as applicable extend and apply to the purchase and taking of such franchise or right (if any) of ferry property rights powers and privileges as if the same were lands within the meaning of those Acts:

(2.) Establish a new ferry or new ferries within the Harbour at such point or points as they may deem expedient and either in substitution for or in addition to any existing ferry:

(3.) Purchase hire provide maintain use and work steam and other

boats and construct and maintain landing stages and other works and conveniences for the purposes of their ferries:

(4.) Lease any ferry or ferries or grant licences to boatmen or others working the same:

Provided always that the Commissioners shall not under this Act establish any new ferry or ferries unless and until they shall have acquired any franchise or right (if any) of ferry which any such new ferry would interfere with or prejudicially affect Provided also that nothing in this Act shall recognize or confirm any title right or claim to any existing or other ferry across the Harbour as an ancient ferry."

Sect. 32: "The Commissioners may demand and receive for the use of any ferry purchased or established by them under this Act any tolls not exceeding the sums mentioned in the First Schedule to this Act," except from persons on the service of the Crown.

Sect. 39, the marginal note of which was "For protection of Bankes Settled Estates," provided by sub-s. 4: "During such period as the owners" [of the Bankes Settled Estates] "shall be willing to grant or shall have granted to the Commissioners a lease of the ferry belonging or reputed to belong to the owners between South Haven Point and the Sandbanks and after the expiration of any such lease during such period as the owners shall themselves work the said ferry (charging only the tolls scheduled to this Act) the Commissioners shall not exercise the compulsory powers contained in" [s. 31, sub-s. 1]. "The said leases shall be for such terms not exceeding twenty-one years and at such rent and in such form as may be mutually agreed between the owners and the Commissioners." . . . .

"(5.) Nothing contained in sub-ss. 2 and 3 of" [s. 31] "shall authorize the Commissioners save as mentioned in the immediately preceding sub-section" [presumably sub-s. 4 of s. 39, enacted: "For protection of Bankes Settled Estates," and sub-s. 1 of s. 31] "to establish a new ferry or new ferries to any new point in the manors of Studland Corfe Langton Wallis or Hundred of Hasilore or on the lands of the owners or to construct and maintain landing stages or other works and conveniences for the purposes of ferries in the said manors or on any lands belonging to the owners without their consent in writing and upon such terms as they think fit."

By s. 51 the Commissioners were empowered to make or repeal such by-laws as they should think fit for, among other purposes, regulating controlling limiting and prescribing the use of any ferry and landing stage within the limits of the harbour and the conduct of persons using any such ferry or stage, and for regulating the management and use of all or any of the piers and landing stages used in connection with any such ferry and the admission of persons thereto and the conduct of persons thereat and thereon.

The Bournemouth-Swanage Motor Road and Ferry Act, 1923 (13 & 14 Geo. 5, c. lxxxviii.), intituled An Act to incorporate and confer powers upon the Bournemouth-Swanage Motor Road and Ferry Company and for other purposes, recites that the motor road and ferry by the Act authorized to be constructed and established would provide a more direct means of communication between Bournemouth and Swanage and be of public and local advantage. By s. 3 of the Act "the motor road" "the ferry" "the landing stages" and "the undertaking" mean respectively the motor road the service of ferry vessels the landing stages and the

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THE BOURNEMOUTH-SWANAGE MOTOR ROAD AND FERRY CO. v. HARVEY & SONS.

undertaking authorized by the Act. "The Commissioners" means the Poole Harbour Commissioners; "the Harbour" means Poole Harbour, as defined by the Poole Harbour Act, 1914.

By s. 4 of the Act the Bournemouth-Swanage Motor Road and Ferry Company, hereinafter called the Company, was incorporated. By s. 43: "Subject to the provisions of this Act the Company may make and when made shall afterwards maintain upon the lands and in the line or situation and according to the levels shown on the deposited plans and sections the motor road hereinafter described together with all necessary and proper bridges approaches footways toll houses gates barriers fences culverts depôts offices buildings yards works and conveniences connected therewith. The motor road will be situate in the county of Dorset and is:—A motor road (work No. 1) 2 miles 7 furlongs 7.50 chains or thereabouts in length wholly in the parish of Studland in the rural district of Wareham and Purbeck commencing at South Haven Point and terminating by a junction with the public road leading from Studland to Swanage."

By s. 51: "The Company shall at all times keep open the motor road so as to be available for use by foot passengers free of toll and by all other persons and all animals vehicles and other traffic upon payment of the tolls and charges payable under this Act and compliance with the regulations and by-laws for the time being of the Company."

By s. 56: "Subject to the provisions of this Act the Company may establish maintain work and use a ferry service for passengers animals vehicles and goods between the Sandbanks and South Haven Point within the Harbour and may for that purpose purchase construct hire and provide employ maintain use work and sell or lease such vessels as they may deem necessary together with all proper appliances and conveniences including the laying down and maintaining of chains cables and other apparatus along across over or under the Harbour."

By s. 57, sub-s. 1: "The Company may by agreement purchase and use any franchise (if any) of ferry between the Sandbanks and South Haven Point and any property (real or personal) rights powers and privileges held or enjoyed by the owner or owners of such franchise or right (if any) of ferry for the purposes thereof Provided that nothing in this Act shall recognize or confirm any title right or claim to any existing or other ferry across the Harbour as an ancient ferry.

"(2.) The Company and the Commissioners may enter into and carry into effect agreements for the lease to or working by the Company of any ferry or ferries of the Commissioners or the rights of the Commissioners to establish any such ferry or ferries."

Sect. 62 was, according to the marginal note, "For protection of Poole Harbour Commissioners." It was in these terms: "The following provisions shall unless otherwise agreed in writing between the Company and the Commissioners have effect with respect to the ferry (that is to say):—

"(1.) Subject to the provisions of this Act the Company shall establish or acquire and thereafter continuously work a ferry between the Sandbanks and South Haven Point and so long as such ferry shall be worked by the Company upon the terms and conditions hereinafter contained the Commissioners shall not under the powers rights and privileges conferred on them by the Poole Harbour Act, 1914, or otherwise either purchase take or use

any other ferry between the Sandbanks and South Haven Point or establish a new ferry between such points or license or otherwise permit to be established under their authority any further or new service of ferry between such points:

"(2.) The ferry shall be worked by a vessel propelled by steam or other power on a chain cable system." . . . .

"(6.) Not more than one vessel shall be at any time used on the ferry without the consent of the Commissioners Provided that the Commissioners shall not refuse their consent to a second vessel unless in their opinion it would interfere with or be detrimental to the traffic of the Harbour. . . . .

"(10.) The Company shall provide from seven o'clock in the forenoon when summer time is in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day and at stated times a minimum hourly service of vessels from each shore.

"(11.) The Company shall not be required to continue and efficiently work the ferry if at any time they are prevented from so doing by any accident or damage to the vessel or vessels or the machinery works or gear connected therewith or by force majeure or by any strike lock out civil commotion or other cause beyond their control.". . . .

"(19.) If at any time after the Company shall have commenced to work the ferry they shall cease to work the same for a period of one calendar month (except as provided by sub-s. 11 of this section) the Commissioners may at any time thereafter serve upon the Company one month's notice in writing requiring them to sell to the Commissioners so much of the undertaking of the Company as relates to the ferry (including all such vessels landing stages buildings equipment and property as may have been employed by the Company in connection therewith) and as from the expiration of the said notice the Company shall sell and the Commissioners shall purchase such part of the undertaking upon terms of paying the then value of such part of the undertaking (exclusive of any allowance for past or future profits or any compensation for compulsory purchase or of goodwill or of any similar considerations) such value to be in case of difference determined by arbitration and as from the expiration of the said notice the Commissioners may work and use such vessels landing stages buildings equipment and property and the provisions of the Poole Harbour Act, 1914, shall extend and apply in respect thereof as if the same were a ferry purchased or established by the Commissioners under that Act." . . . .

Sect. 97 contained provisions "for the protection and benefit of George Henry William Hervey and the Right Honourable Sir John Eldon Bankes their heirs or successors in estate or other the owner or owners for the time being of the lands or premises situate in the parish of Studland which on June 1, 1923, formed part of the Bankes Settled Estates," therein called "the owners." Sub-ss. 9, 10, 11, 14 and 15 of this section are set out in the judgment of Scrutton L.J.

W. H. G.

EVE J.
1929
Feb. 19.

In re RAINE.

TYERMAN *v.* STANSFIELD.

[1928. B. 2624.]

Will—Contingent pecuniary Legacy—Infant entitled on attaining Twenty-one —No Direction to appropriate—Whether carrying intermediate Interest— Maintenance—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31, *sub-ss.* 1, 3— *Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 175.

A contingent or future pecuniary legacy payable to an infant upon attaining twenty-one does not carry intermediate income under s. 175 of the Law of Property Act, 1925, and there is no power under s. 31 of the Trustee Act, 1925, to apply the interest, or intermediate income thereof, when invested, for the infant's maintenance, unless the testator is the parent of or in loco parentis to the infant, or has indicated an intention by his will that the infant should be maintained out of the income, or has directed the legacy to be appropriated and invested for the benefit of the infant.

In re Dickson (1885) 29 Ch. D. 331 and *In re Boulter* [1918] 2 Ch. 40 applied.

ORIGINATING SUMMONS.

By her will dated November 21, 1924, Mrs. Annie Jane Raine appointed the plaintiffs to be executors and trustees and gave certain pecuniary legacies free of duty, including the following, to her god-child Sydney S. Stansfield, the sum of 2000*l.*, if and when he should attain the age of twenty-one years, and to Sylvia Stansfield (a sister of Sydney S. Stansfield), the sum of 100*l.*, if and when she should attain the age of twenty-one years. Subject thereto the testatrix gave all her real and personal estate to her trustees upon trust for conversion, payment out of the proceeds of funeral and testamentary expenses, debts and legacies and all death duties, and to hold the net residuary estate in trust for her sister in law therein mentioned. The will contained no direction to appropriate any funds to meet the contingent legacies.

The testatrix died on November 15, 1926. At that date Sydney S. Stansfield was nine years of age, and Sylvia Stansfield fourteen. The testatrix did not stand in loco parentis to either of the children.

The question raised by the summons was whether the two contingent legacies carried the income arising therefrom as from the date of the testatrix's death, and whether such income ought to be applied in the maintenance of the infants. (1)

A. J. Belsham for the plaintiffs.

J. W. F. Beaumont for the infants. The infants are entitled to maintenance out of the intermediate income of the legacies under s. 175 of the Law of Property Act, 1925. The word "specific" qualifies "devise" only, not "bequest": see Theobald on Wills, 8th ed., pp. 193, 198. It would be absurd for a contingent legacy of "my 1000*l.* consols" to

(1) By the Trustee Act, 1925, s. 31 (substantially re-enacting s. 43 of the Conveyancing Act, 1881, with additions and amendments):—

"(1.) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property:—

(i.) During the infancy of any such person, if his interest so long continues, the trustees may at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(*a*) Any other fund applicable to the same purpose; or

(*b*) Any person bound by law to provide for his maintenance and education; and

(ii.) If such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2.) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest.

. . . . . .

(3.) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee. . . . ."

By the Law of Property Act, 1925, s. 175:—

"(1.) A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income or any part thereof may be otherwise especially disposed of.

(2.) This section applies only to wills coming into operation after the commencement of this Act."

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RAINE, *In re.* TYERMAN *v.* STANSFIELD.

carry intermediate interest, but not a legacy of 1000*l.* cash: *In re Churchill.* (1) But if it should not come under s. 175 then s. 31 of the Trustee Act, 1925 (re-enacting s. 43 of the Conveyancing Act, 1881), must be read into the will, and so read in there is a provision for maintenance out of the interest or intermediate income: *In re Stokes.* (2) The present case is similar to that of the trust fund C. mentioned in that case, which followed the decision of Kekewich J. in *In re Moody.* (3)

Eardley-Wilmot for the residuary legatee. Sect. 175 of the Law of Property Act, 1925, does not include the case of a general pecuniary legacy; the word "specific" applies both to "devise" and "bequest." A pecuniary legacy if appropriated and invested may produce interest, but it has no "intermediate income." A pecuniary contingent legacy does not carry intermediate income within s. 31, sub-s. 3, of the Trustee Act, 1925, and if so, there can be no maintenance payable thereout. It was held in *In re Dickson* (4) that s. 43 of the Conveyancing Act, 1881, did not apply to a contingent legacy, where the testator did not stand in loco parentis to the infant legatee: and see *In re Boulter.* (5) There was no direction contained in the will to set aside and invest the sums of 2000*l.* and 100*l.* to meet these legacies, but the trustees have distributed the whole of the estate, except war stock, sufficient to meet them. In *In re Stokes* (2) the legacies were directed to be set aside and invested.

Beaumont in reply referred to *In re Richards.* (6)

EVE J. The question to be decided is whether the income of two pecuniary legacies bequeathed contingently upon the legatees attaining twenty-one is applicable for the maintenance of the legatees while under age or falls into residue. The legacies in question are 2000*l.* bequeathed "to my godchild Sydney Selby Stansfield if and when he shall attain the age of twenty-one years," and 100*l.* to Sylvia Stansfield "if and when she shall attain the age of twenty-one years." The will contains no express power of maintenance, and there is

(1) [1909] 2 Ch. 431.
(2) [1928] Ch. 716.
(3) [1895] 1 Ch. 101, 106.
(4) (1885) 29 Ch. D. 331.
(5) [1918] 2 Ch. 40, 44.
(6) (1869) L. R. 8 Eq. 119.

a complete residuary devise and bequest. On behalf of the legatees s. 175 of the Law of Property Act, 1925, ante, p. 717, note (1), is first relied upon. There is nothing in the will by which the income of these legacies or any part thereof is expressly disposed of; if not applicable for maintenance it falls into residue. But does a pecuniary legacy come within the words "A contingent or future specific devise or bequest of property, whether real or personal"? In my opinion it does not. I think the adjectives "contingent future and specific" apply both to the devise and the bequest, and that a pecuniary legacy cannot be said to be a specific bequest of personal property. Had it been intended to include pecuniary legacies I think more appropriate language would have been employed. That being so, one is relegated to the law prior to the passing of the Act, and I think that is fully and accurately stated by Younger J. in *In re Boulter* (1), where at p. 44 he says: "The rule of the Court on this subject is, I think, quite settled. It depends, first, to some extent, upon the question whether the testator was the father or stood in loco parentis to the infant. In such a case, even if the legacy be not by the testator directed to be set apart for the benefit of the legatee, the legacy will bear interest for maintenance for so long as no maintenance is expressly provided for the infant by the testator." In support of that he cites *In re Bowlby* (2): "On the other hand, a contingent legacy in favour of an infant of whom the testator is not the father, or towards whom he does not stand in loco parentis, and which is not directed to be set apart for the benefit of the infant, bears no interest either for maintenance or otherwise until it vests." For that he cites the authority of the Court of Appeal in *In re Dickson* (3): "Where, however, a contingent legacy is directed to be set aside so as to be available for the legatee so soon as the contingency happens, then the fund carries all its accretions from the moment when it is so set aside: and whether an infant (if the legatee) be or be not one towards whom the testator stood in loco parentis." In the present case it is

(1) [1918] 2 Ch. 40, 44. (2) [1904] 2 Ch. 685, 706.
(3) (1885) 29 Ch. D. 531.

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not suggested that the testatrix stood in loco parentis towards the legatees and there is no direction to set aside either legacy. True it is the estate has been distributed, and the only part of it retained is the amount necessary for satisfying these legacies if and when they become payable; but that is a setting aside by the executors not a setting aside by the testatrix, which would have taken these legacies out of the general rule. The case of *In re Churchill* (1) shows that there is a further exception to the rule in cases where the testator has shown an intention that the legatee shall be maintained as part of the testator's bounty; "in such a case," says Warrington J., "the legacy will bear interest from the testator's death until the legacy becomes payable." In the will there being construed the testatrix empowered her trustees at their discretion to apply the whole or any part of the share to which any beneficiary thereunder might be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary, whether male or female, and whether under the age of twenty-one years or not, and the learned judge, in coming to the conclusion that this provision was a sufficient indication of the testatrix's intention, said: "In the present case what I have to determine is whether in the will before me there is sufficient to bring the matter within that exception. Has the testatrix expressed an intention that the infant legatee shall be maintained out of her bounty?" And, after reading the clause to which I have just referred, he adds: "If the direction had been 'towards the advancement in life' of the legatee only, that would clearly not have been sufficient; but the testatrix goes on to say 'or otherwise for the benefit of such beneficiary whether male or female and whether under the age of twenty-one years or not'—that is, for maintenance as distinguished from advancement." Accordingly on the construction of that will he held that the income from the death of the testatrix could be applied for maintenance.

Then it is argued that inasmuch as it was decided in *In re Moody* (2) that there must be read into every will the statutory

(1) [1909] 2 Ch. 431, 433, 434. (2) [1895] 1 Ch. 101.

provision for maintenance contained in s. 43 of the Conveyancing Act, 1881, it follows that in every will there is expressed an intention on the part of the testator that infant legatees shall be maintained out of his bounty. It was not so decided in *In re Moody*. The testator there was the father of the legatees, and what was there held was that although s. 43 ought to be read as part of the will there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, and accordingly that the legacies to the infant son and daughter respectively carried interest as from the death of the testator. Nor does *In re Stokes* (1) deal with this point, for in that case the trust fund was directed by the testatrix to be set apart and invested. Here, as I have already said, the testatrix did not stand in loco parentis to the legatees; there was no direction to set apart or appropriate the legacies, and the only clause of maintenance which I can incorporate in the will is s. 31 of the Trustee Act, 1925 (re-enacting s. 43 of the Conveyancing Act, 1881). Does the incorporation of that section evidence an intention of such a nature as was held to be present in the case of *In re Churchill*? That, I think, is concluded by the construction imposed on the statutory power by the Court of Appeal in *In re Dickson* (2), where, affirming a decision of Kay J., the Court decided that the section does not authorize the allowance of maintenance, where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest. Here it is obvious that apart from any statutory or other power to give maintenance these two legatees are only entitled to their respective legacies on attaining twenty-one without interest, and that being so I think they are not entitled to any intermediate interest, either under the law apart from the Act of 1925, or under s. 175 of that Act.

Solicitors: *Bell, Brodrick & Gray, for Buchannan & White, Whitby; Lovell, Son & Pitfield, for R. E. Druitt, Christchurch.*

(1) [1928] Ch. 716. (2) (1885) 29 Ch. D. 531.

H. L. L.

EVE J.
1929
Jan. 11, 17.

In re LAMB.

VIPOND *v.* LAMB.

[1928 L. 2119.]

Administration—Payment of Funeral Expenses, Debts and Legacies—Order of Application of Assets—"Property undisposed of by will"—Lapsed Share of Residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II.*

A share of residuary estate which lapses owing to the person who would have been entitled to it under the will of a testator predeceasing the testator is "property undisposed of by will" within cl. 1 of Part II. of the First Schedule to the Administration of Estates Act, 1925, and therefore under s. 34, sub-s. 3, of the Act primarily liable, subject to any direction to the contrary in the will, to the discharge thereout of funeral and testamentary expenses, debts and legacies.

ADJOURNED SUMMONS.

The testator, John Lamb, of Silloth, Cumberland, by his will dated July 28, 1923, appointed the plaintiffs J. E. Vipond and I. L. Whitaker to be the executors and trustees thereof, and directed that all his just debts, funeral and testamentary expenses, should be paid by them as soon as possible after his decease. The testator devised the Luckens Estate in the parish of Stapleton, Cumberland, to his brother Thomas Lamb for his life on condition that he neither sold it nor mortgaged it at any time, and after his death to a cousin also named Thomas Lamb for his life. After certain specific and pecuniary bequests, including legacies to certain charities totalling 260*l.*, the testator directed that the rest residue and remainder of his real estate real and personal whatsoever and wheresoever (if any) should be equally divided between his said brother, his said cousin and two nephews William Beesley and Alfred Beesley, the sons of the testator's eldest sister.

The testator died on March 16, 1928, but his brother Thomas Lamb predeceased him, and therefore one-fourth share of the residue lapsed, and went to the next of kin.

The summons was taken out by the executors and trustees to determine the question whether having regard to s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and to

Part II. of the First Schedule thereto, the testator's funeral and testamentary expenses, debts and legacies ought to be paid out of the lapsed share of residue, as being property "undisposed of" in priority to the other vested shares in the residue, or rateably out of the lapsed share and the other shares or how otherwise.

W. F. Waite for the plaintiffs.

C. D. Myles for the residuary legatees. The effect of s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and Part II. of the First Schedule is to make a share of residue which has lapsed, being "property undisposed of by will," the primary fund for the payment of funeral and testamentary expenses and debts, to the exoneration of the residue generally, unless there is a direction to the contrary in the will, which is not the case here. There is a direction to pay debts, which under the old law would have been a charge of debts on the real and personal estate: see Wolstenholme and Cherry's Conveyancing Statutes, vol. ii., p. 583; Theobald on Wills, 8th ed., p. 937.

Alan Ellis for the next of kin. The old rule is still applicable, and neither the debts nor the legacies are primarily payable out of the lapsed share: *Trethewy* v. *Helyar.* (1) There is no "residue" at all until all funeral and testamentary expenses and debts have been fully paid. The expression "property undisposed of by will" means property which the testator has not attempted to dispose of by will. The case comes under para. 2 of Part II. of the Schedule as "property included in a residuary gift." The section deals with partial as well as complete intestacies: see also s. 45, sub-s. 1 (*b*); s. 51, sub-s. 2; and s. 55, sub-s. 1 (vi.), defining "intestate" as including a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate. The residuary estate must be ascertained before one can say what has lapsed.

Myles in reply. If there is a residuary gift, there can be nothing undisposed of by the will unless there is a lapsed share of residue.

Cur. adv. vult.

(1) (1876) 4 Ch. D. 53.

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LAMB, *In re.*
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EVE J. By his will dated July 28, 1922, the testator appointed the applicants to be his executors and trustees, and after directing that all his just debts funeral and testamentary expenses should be paid by them as soon as possible after his decease and devising the Luckens Estate at Stapleton in Cumberland to his brother Thomas Lamb for life with remainders over and bequeathing several pecuniary legacies, directed that the rest residue and remainder of his estate, real and personal whatsoever and wheresoever should be equally divided between his said brother, his cousin and his two nephews therein mentioned. He died on March 16, 1928. Thomas Lamb, the brother, predeceased him, with the result that one-fourth share of the residuary estate is undisposed of, and by this summons the applicants raise this question, whether the funeral, testamentary and administration expenses and the testator's debts and the pecuniary legacies bequeathed by his will are payable primarily out of the lapsed share of residue or how otherwise. The answer is to be found in s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and Part II. of the First Schedule to the Act.

The section, so far as is relevant to this case, provides that " where the estate of a deceased person is solvent, his real and personal estate shall, subject to the provisions contained in his will, be applicable towards the discharge of the funeral testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

Part II. of the Schedule divides the assets into seven categories, and the first two in order of application are :—

" 1. Property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

" 2. Property of the deceased not specifically devised or bequeathed, but included (either by a specific or general description) in a residuary gift subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies so far as not provided for as aforesaid."

It was argued on behalf of the next of kin that " property

of the deceased undisposed of by will" must be confined to property to dispose of which no attempt has been made by the will, and ought not to be read as including a share of residue which has lapsed by reason of the legatee's death in the lifetime of the testator, also that the Legislature ought not to be presumed to have intended to effect so material a change in the pre-existing practice by the passages to which I have referred.

But the language is plain and unambiguous—a lapsed share of residue is properly described as property undisposed of by will, and the change is not more drastic than others brought about by other parts of the Act. Moreover it is to be borne in mind that the order of application may be varied by the will.

In the present case, I can see nothing to exclude the application of the statutory order of application, and I must hold that it is applicable.

Solicitors: *Gregory, Rowcliffe & Co., for Wright, Brown & Strong, Carlisle.*

H. L. L.

ASTBURY J.

1929

March 13, 14.

In re PETTY.

HOLLIDAY *v.* PETTY.

[1929. P. 154.]

Will—Trust for Sale—Mixed Fund for Payment of Debts, etc.—Balance disposed of in Moieties—Lapse of one Moiety—Incidence of Debts, etc.—Intention—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-s.* 7; *s.* 34, *sub-s.* 3; *Sch. I., Part II., para.* 8 (*a*).

A testator devised and bequeathed his residuary real and personal estate upon trust for sale and conversion, and after directing payment of his debts, etc., out of that mixed fund gave the residue thereof thereinafter referred to as the residuary trust fund, as to one-half to his wife and as to the other half to two daughters in settled shares.

The testator died in 1928. His wife having predeceased him, her moiety lapsed and passed as on an intestacy:—

Held, that the order of application of assets prescribed by the Administration of Estates Act, 1925, Sch. I., Part II., being under s. 33, sub-s. 7, s. 34, sub-s. 3, and Sch. I., Part II., para. 8 (*a*), expressly subject to variation by the provisions of the will, which in this case clearly threw the debts, etc., rateably on the mixed fund, those debts, etc., were payable out of that mixed fund rateably, and not primarily out of the lapsed moiety.

In re Lamb [1929] W.N. 29; since reported ante, p. 722, distinguished.

ORIGINATING SUMMONS.

By clause 17 of his will dated August 29, 1921, a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses (except the estate duty previously charged on certain shares specifically bequeathed to his sons by clause 11) and debts and the pecuniary legacies bequeathed by the will or any codicil thereto, and all duties payable in respect of all annuities legacies and other gifts given free of duty.

By clause 18 the testator directed his trustees to stand possessed of the residue of the said moneys thereinafter referred to as the residuary trust fund in trust to divide the same into two equal parts and to pay one equal half part thereof to his wife and to hold the other equal half part of the residuary trust fund in trust for his daughters Christine and Katherine in equal shares.

By clause 19 the daughters' shares were settled.

The testator died on April 22, 1928. His wife having predeceased him, her moiety of the residuary trust fund lapsed, and passed as on an intestacy.

On January 21, 1929, the plaintiff, a neutral executor and trustee, issued this summons to determine (inter alia) whether this lapsed moiety was applicable towards the discharge of the testator's funeral and testamentary expenses (except estate duty expressly charged on specific legacies) and debts and the pecuniary legacies in priority to or rateably with the other moiety.

Harold Christie for the plaintiff.

Mumford for the settled moiety. The lapsed moiety is primarily liable: *In re Lamb* (1); Administration of Estates Act, 1925, s. 34, sub-s. 3, Sch. I., Part II. There is nothing in this will to alter the statutory incidence.

Harman, *Winterbotham* and *Danckwerts* for various next of kin. It appears from the will in *In re Lamb* (1) that there was a mere direction for payment of debts funeral and testamentary expenses followed by a specific devise and a gift of certain legacies, subject to which the residue was disposed of in specie. That no doubt created a charge in aid on the realty, but did not alter the primary liability of the personalty. In other words it did not alter the ordinary order of application of assets.

Here however there is a trust for sale and the creation of a mixed fund for payment of those liabilities. That clearly charges everything rateably. The distinction is pointed out in Theobald on Wills, 8th ed., p. 942. Under the old law this rateability was no doubt between real and personal estate, but the same principle must apply as between disposed and undisposed of estate under the new law: see Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., vol. ii., p. 583.

The order of application of assets directed by the 1925 Act is expressly subject to the provisions of the will: see s. 33, sub-s. 7, s. 34, sub-s. 3, and Sch. I., Part II., para. 8 (*a*);

(1) [1929] W. N. 29; since reported ante, p. 722.

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and under s. 55, sub-s. 1 (vi.). "Intestate" includes a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate.

In any case the Act does not alter the incidence of death duties: s. 53, sub-s. 3 (*c*).

The testator has not really died intestate as to half his residuary estate, but only as to half the residuary trust fund ascertained after the liabilities have been paid rateably out of the mixed fund.

ASTBURY J. [after stating the facts:] It is plain that the wife's moiety of the residuary trust fund lapsed, and is distributable as on an intestacy. The question is whether this lapsed moiety is applicable to the payment of funeral and testamentary expenses debts and legacies in priority to or rateably with the other moiety.

On the construction of the will alone the matter would be perfectly plain. The testator devised his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses debts and legacies and to divide the balance of residue called the residuary trust fund into two parts, one of which he gave to his wife.

The moiety given to the wife having lapsed by her death in the testator's lifetime, the question is whether under the recent legislation the order of application of assets in making the above payments as directed by the will is to be interfered with.

Now the Administration of Estates Act, 1925, raises many questions. Part III., headed "Administration of Assets," contains ss. 32 to 44.

Sect. 33, sub-s. 1, provides that on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives:—

(*a*) As to the real estate upon trust to sell the same; and

(*b*) As to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money. . . . .

Sub-s. 2 provides that out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased "(so far as not disposed of by his will, if any)," the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilites as are properly payable thereout having regard to the rules of administration contained in Part III. of the Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the deceased's will (if any).

What the phrase "on the death of a person intestate" means is a little difficult to answer, particularly where that person dies only partly intestate.

Sub-s. 6 provides that nothing in this section affects the right of any creditor of the deceased or "the rights of the Crown in respect of death duties."

Sub-s. 7 provides that where the deceased leaves a will, "this section has effect subject to the provisions contained in the will."

The will is therefore to be given effect to if and so far as it is inconsistent with s. 33.

Sect. 34, sub-s. 3, the most important sub-section in the present case, provides that where the estate of a deceased person is solvent, his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and "to the provisions, if any, contained in his will," be applicable towards the discharge of the funeral testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Sch. I., Part II.

Sch. I., Part II., prescribes the order of application of assets where the estate is solvent, but para. 8 (*a*) provides that "the order of application may be varied by the will of the deceased."

That must mean that the express provisions of the will are to have effect, notwithstanding the order of application of assets prescribed by the Schedule.

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The question is nevertheless raised whether this lapsed moiety being property undisposed of is property applicable to the payment of funeral testamentary and administration expenses debts and liabilities in priority to the other moiety.

I cannot believe that the statute intended to interfere with the testator's right to deal with his own estate as he liked. Here it is plain that he created a mixed fund for the payment of funeral and testamentary expenses debts and legacies, and there was no undisposed of moiety of the balance of residue until those expenses and debts were ascertained and paid. In those circumstances the estate must be administered according to the testator's directions, and the expenses and debts are not thrown primarily on the lapsed moiety.

The argument for the settled moiety relied on *In re Lamb*. (1) It is at present only shortly reported, but a copy of the will has been produced, from which it appears that there was no trust for sale creating a mixed fund, but there was a mere direction for payment of debts funeral and testamentary expenses, followed by a specific devise and a gift of certain legacies, subject to which the residue was disposed of in specie. Eve J. held that a lapsed share of residue was property "undisposed of" by the will, and therefore now the primary fund for the payment of funeral and testamentary expenses debts and legacies. He said that the order of application might have been varied by the will, but in that case there was nothing to exclude the new statutory order of application, and it was therefore applicable.

I need not discuss the will in *In re Lamb* (1), as if the old law was still subsisting, a mere charge of debts, which was all that the direction for their payment amounted to, would not alter their incidence, and Eve J. probably took that view.

The present case is entirely different. The funeral and testamentary expenses, debts and legacies are not thrown on the lapsed moiety at all. It is only the moiety of the

(1) [1929] W. N. 29; since reported ante, p. 722.

residuary trust fund determinable after payment of those sums out of residue that has lapsed, and the two moieties of residue must therefore bear these sums rateably.

Solicitors: *Patersons, Snow & Co., for Lupton & Fawcett, Leeds.*

G. R. A.

In re LOMER.

PUBLIC TRUSTEE *v.* VICTORIA HOSPITAL FOR CHILDREN.

[1928. L. 2452.]

Revenue—Estate Duty—Future Estate Duty—Incidence—Will—Legacies—Priority Clause—Construction—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

By his will dated 1911 a testator devised and bequeathed his residuary real and personal estate to his executors (the Public Trustee and another) upon trust for sale and conversion and, after payment of his debts and funeral and testamentary expenses, he desired the balance (called his residuary trust fund) to be placed with the Public Trustee and the income paid to his wife for life.

The testator then directed that after his wife's death four capital sums amounting to 10,000*l.* (free of estate duty and settlement estate duty but not free of legacy duty) should be set apart and the respective incomes paid to certain life tenants respectively.

By clause 9 the testator directed that on the cesser of the respective life tenancies, the respective capital sums should be paid to thirteen charities thereinafter named "in the order of priority in which the names appear in this my will as far as the money will go (No. 1 being first paid; No. 2 next and so on) that is to say:—" The testator then enumerated thirteen consecutive charities, giving Nos. 1 to 10 500*l.* apiece; No. 11 1000*l.*; and Nos. 12 and 13 2000*l.* apiece, thereby exhausting the 10,000*l.*

The residue, after providing for the settled 10,000*l.*, was given to a daughter.

The testator died on June 11, 1914, before the Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14, abolishing settlement estate duty and the relief thereby conferred was passed.

The estate was cleared and the residuary trust fund paid to the Public Trustee, who paid the income to the wife till her death on July 1, 1928, and then set apart the 10,000*l.* settled legacies. One of these was

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immediately distributable, without further payment of estate duty, owing to the life tenant having predeceased the wife; but on the cesser of subsequent life tenancies estate duty would be payable, and the Public Trustee therefore issued a summons to determine how it was to be borne, as between the successive charities :—

Held, that clause 9 conferred an absolute priority as between the successive charities, and was sufficient as between the earlier and the later charities to exempt the former from their prima facie statutory liability to contribute to the estate duty under the Finance Act, 1894, s. 8, sub-s. 4.

Berry v. *Gaukroger* [1903] 2 Ch. 116 distinguished.

ORIGINATING SUMMONS.

By his will dated February 21, 1911, a testator, after appointing Lohmeyer and the Public Trustee executors, devised and bequeathed his residuary real and personal estate to his executors upon trust for sale and conversion, and after payment of his just debts and funeral and testamentary expenses he desired the balance, thereinafter called his residuary trust fund, to be invested in trust securities and placed with the Public Trustee for the purposes thereinafter expressed.

By clause 4 the income of the residuary trust fund was to be paid to the testator's wife for life.

By clause 5 the testator directed that after his wife's death the sum of 7500*l.* (free of estate duty and settlement estate duty but not free of legacy duty (if any)) should be appropriated and set apart out of his estate and invested in trust securities and the income paid to his daughter Ada for life and after her death to her daughter Kathleen for life. In the event of Ada dying before Kathleen attained twenty-one the income was to be accumulated and handed over to Kathleen on attaining twenty-one.

By clause 6 the testator further directed that after his wife's death the further sum of 1250*l.* (free of estate duty and settlement estate duty but not free of legacy duty) should be appropriated and set apart out of his estate and invested in trust securities and the income paid to Lohmeyer for life.

By clause 7 the testator further directed that after his wife's death the further sum of 750*l.* (free of estate duty and

settlement estate duty but not free of legacy duty) should be appropriated and set apart out of his estate and invested in trust securities and the income paid to Marion Harland for life.

By clause 8 the testator further directed that after his wife's death the further sum of 500*l.* (free of estate duty and settlement estate duty but not free of legacy duty) should be appropriated and set apart out of his estate and invested in trust securities and the income paid to Nellie Pibworth for life and after her death to Mildred Buck for life. Should Nellie Pibworth die before Mildred Buck attained twenty-one the income to be paid to Mildred Buck's mother, if living, for her maintenance, but otherwise to be accumulated and the accumulations handed over to Mildred Buck on her majority.

By clause 9 the testator directed that as the funds given by clauses 5, 6, 7 and 8 should respectively fall in by the deaths of the respective life tenants, the respective capital sums set apart as aforesaid or the securities representing the same should be paid to or divided between the charities thereinafter named "in the order of priority in which the names appear in this my will as far as the money will go (No. 1 being first paid; No. 2 next and so on) that is to say :—

No. 1. The National Society for Prevention of Cruelty to Children 500*l.*

No. 2. Lord Mayor Treloar's Cripples Hospital and College 500*l.*

No. 3. The Victoria Hospital for Children Chelsea 500*l.*

No. 4. The Hospital for Sick Children Great Ormond Street 500*l.*

No. 5. The Queen's Hospital for Children Hackney Road 500*l.*

No. 6. The Surgical Aid Society 500*l.*

No. 7. The Royal Hospital for Incurables Putney Heath 500*l.*

No. 8. The St. Giles' Christian Mission 500*l.*

No. 9. The Church Army 500*l.*

No. 10. The London Missionary Society 500*l.*

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No. 11. The Ragged School Union and Shaftesbury Society 1000*l.*

No. 12. Dr. Barnardo's Homes 2000*l.*

No. 13. The Salvation Army (for social work) 2000*l.*

Should any of these societies have ceased to exist when the respective funds are available for distribution I empower my trustees to distribute the same among such charities as come nearest in aim to those indicated but excluding any of a purely sectarian character."

Clause 10 provided that the remainder of the capital existing at the wife's death after providing for the capital sums set apart under clauses 5, 6, 7 and 8 should be paid to the testator's daughter Ada if then living.

The testator died on June 11, 1914, before the Finance Act, 1914, s. 14, was passed, and his will was proved by both executors on July 3.

The testator's debts and funeral and testamentary expenses including all death duties payable on his death were duly paid and discharged and the residuary trust fund was transferred to the Public Trustee, who paid the income to the testator's wife until her death on July 1, 1928.

No further estate duty was payable on the wife's death, and the Public Trustee had appropriated funds to meet the legacies under clauses 5, 6, 7 and 8.

Owing to the previous death of Lohmeyer on December 21, 1921, before coming into his life interest in the 1250*l.* under clause 6, that sum was immediately distributable, and no estate duty was payable thereon. The Public Trustee therefore proposed to pay this amount under clause 9 as to 500*l.* less legacy duty to charity No. 1; as to 500*l.* less legacy duty to charity No. 2; and as to 250*l.* less legacy duty in part payment to charity No. 3.

On the dropping of future life interests, however, estate duty would be payable, and the question arose how it should be borne.

On December 6, 1928, the Public Trustee issued this summons to determine

(1.) whether upon the true construction of the will the estate duty payable on the deaths of the respective life tenants of the settled legacies bequeathed by clauses 5, 6, 7 and 8 ought to be borne—

(*a*) by those settled legacies respectively, or

(*b*) by the residuary estate.

(2.) If the duty was to be borne by the settled legacies how it ought to be borne as between the legacies respectively bequeathed by clause 9.

On the summons coming on it was at once admitted that the future estate duties fell on the settled legacies and not on the residue, and the only question was whether clause 9 altered the incidence of these duties as between the charities.

R. H. Hodge and *B. S. Tatham* for the Public Trustee.

Archer K.C. and *F. W. Waite* for charity 3, the first defendant. The priority given by clause 9 is perfectly clear. It is for the later charities to displace it.

Vaisey K.C. and *Winterbotham* for charity 4, the second defendant. We agree.

Spens K.C. and *David Ll. Jenkins* for charity 13, the third defendant. Prima facie each legacy must bear its own share of estate duty unless expressly exempted: Finance Act, 1894, s. 8, sub-s. 4; s. 9, sub-s. 1; s. 14, sub-s. 1; *Berry* v. *Gaukroger* (1); *In re Hicklin.* (2)

Now clause 9 merely gives priority between the legacies inter se. It does not exempt any legacy from estate duty. Priority alone is not sufficient. In *Berry* v. *Gaukroger* (1) the legacies had in fact priority over the residue, but that did not exempt them from their statutory liability.

The obvious construction is to confine clause 9 to overhead expenses, such as costs of administration and distribution and possible depreciation of securities. A deficiency arising in that way is no doubt thrown on the later charities. But clause 9 cannot be read as an exemption of the earlier charities from this future estate duty, which cannot possibly have been in the testator's contemplation. He could not

(1) [1903] 2 Ch. 116, 131, 135. (2) [1917] 2 Ch. 278.

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have foreseen the Finance Act, 1914, s. 14, which was only passed on July 31, 1914, seven weeks after his death, and which abolished settlement estate duty as from May 11, 1914, and the relief given by its payment.

Archer K.C. and *F. W. Waite* for charity 3. The question turns solely on the construction of clause 9. In *Berry* v. *Gaukroger* (1) there were two beneficial interests, legacies and residue, and no priority clause. The Court of Appeal held that the mere fact that the legacies were, as such, prior to the residue was not sufficient to exempt them from their statutory liability.

In the present case clause 9 confers express priority on the successive legacies, as far as the money will go. Surely that means that the instalments of the 10,000*l.* however depleted by overhead charges, taxation or otherwise, are to be applied in the order stated until each successive charity, as far as the money will go, is fully paid, before a subsequent charity comes in. That is an express provision to the contrary within s. 14, sub-s. 1.

Vaisey K.C. and *Winterbotham* for charity 4. We adopt this argument. The other construction would lead to great complication and sooner or later prove unworkable.

W. S. M. Knight for Ada, the residuary legatee, the fourth defendant. The claim against me was dropped ab initio. The only fight was between the charities. In these circumstances I ought not to bear any of the costs of the summons.

ASTBURY J. [after stating the facts:] There is no question and no dispute that the final residue bequeathed by clause 10 is distributable as from the widow's death and that no part of the additional estate duty payable on the termination of the life tenancies in clauses 5, 6, 7 and 8 is payable out of that residue. The question is how that duty must be borne as between the respective charities mentioned in clause 9. One life ceased in the widow's lifetime, and no further estate duty is payable in respect of that cesser, but I am asked to decide how the future estate duty payable on the cesser of

(1) [1903] 2 Ch. 116, 131, 135.

the remaining lives ought to be borne as between the charities.

In *Berry* v. *Gaukroger* (1) a testator who died in 1869 directed that after his wife's death his trustees should hold his residuary trust funds upon trust to pay thereout certain legacies amounting to 9000*l.* and then to divide the residue among certain residuary legatees. Under the Finance Act, 1894, estate duty was payable on the widow's death in 1900 on so much of the funds as represented realty. This was taken at twelve-seventeenths of the whole, so that the proportion attributable to the 9000*l.* legacies was 223*l.* Buckley J. held that the legatees were not persons entitled to a sum charged on the property within s. 14, sub-s. 1; that they were not liable for the 223*l.*, but it was payable out of residue.

The Court of Appeal did not adopt this view, but held upon the construction of s. 8, sub-s. 4, that the pecuniary legatees must bear the 223*l.*

Now apart from this decision it might have been supposed that where a testator directed his trustees, after a life tenant's death, to pay 9000*l.* pecuniary legacies and then to distribute his residue, that the residue distributable only after the 9000*l.* had been provided would bear the further costs and estate duty that the trustees had to provide.

With regard to the additional estate duty, however, the Court of Appeal held that as the whole of the testator's estate on his wife's death was distributable in the proportions mentioned between the pecuniary legatees and the residue, it followed that having regard to s. 8, sub-s. 4, all these persons were accountable for the proportionate part of the duty so payable, with the usual right of contribution inter se, if some of them discharged the whole, as the trustees in *Berry* v. *Gaukroger* (1) had done.

That authority has been frequently followed and applied. The only question remaining for the Court of Appeal to decide after declaring that all the legatees were liable for duty under the statute was whether there was anything in the will to exempt them from their liability to contribute. It is true

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that they were pecuniary legatees entitled to payment before there was any distributable residue. Buckley J. held that this was sufficient to exempt them. The Court of Appeal, however, held that the mere fact that they were called legatees was not sufficient to exempt them from their liability to contribute under s. 8, sub-s. 4.

The facts here are entirely different, though from one point of view they raise a similar question to that in *Berry* v. *Gaukroger*. (1)

The first thing that is plain is that the residuary estate over and above the 10,000*l*. set apart under clauses 5, 6, 7 and 8 was determinable and distributable on the widow's death, and it is not disputed that the residuary legatees cannot be held responsible for estate duties arising and becoming payable long after that distribution.

The only question is how these duties are to be borne as between the charities under clause 9. If clause 9 is insufficient to exempt them from their prima facie liability to contribute rateably under s. 8, sub-s. 4, they will be liable accordingly. If it is sufficient to exempt the earlier charities they will be exempted. The first life ceased in the widow's lifetime and no further estate duty was payable, but as other lives fall in, estate duty will be payable in varying rates according to the life tenant's fortune.

This raises a difficult point as to the true construction, in the circumstances, to be placed on clause 9. If the testator had merely directed the 10,000*l*. to be set apart and appropriated under clauses 5 to 8, and then divided it between the charities as each life tenancy ceased, the principle of *Berry* v. *Gaukroger* (1) would have unquestionably applied, and the moneys so distributable would have been rateably subject to the payment of the respective estate duties. But clause 9 makes a definite provision as to priority of payment. [His Lordship read clause 9.]

The testator may have intended that the money, as far as it would go having regard to costs of administration and distribution, and possible depreciation of securities, should be

(1) [1903] 2 Ch. 116, 131, 135.

paid in order of priority, throwing any deficiency on the later charities. That, as far as it goes, was undoubtedly his intention, but it does not of itself decide whether estate duty, for which every person to whom the property passes for a beneficial interest is accountable, is to be treated in the same way.

The real question is stated by Cozens-Hardy L.J. in *Berry* v. *Gaukroger* (1)—namely, whether there is sufficient in clause 9 to exempt the earlier charitable legatees from their statutory liability to contribute. It is not disputed that if clause 9 is sufficient to exempt the earlier as against the later charities, they will be so exempted.

The first difficulty is that this estate duty liability only arose after the testator's death.

The second difficulty is to ascertain the exact meaning of clause 9. The priority there given may be confined to expenses of administration and to depreciation, still leaving the charities liable for their proportionate part of the estate duty, or it may be an absolute priority.

That is a very difficult question. The amount of confusion and difficulty that may arise if each charity is liable for the proportionate part of the estate duty payable on the cesser of each life is extraordinary. One life tenant might die in circumstances in which the proportionate estate duty would be a trifling percentage of the amount payable to each charity. In another case the percentage might be very great, and if the priority given by clause 9 is not absolute, clause 9 might towards the middle or end of the list become unworkable.

On the whole, though with considerable doubt, I have come to the conclusion that clause 9 confers absolute priority. I think that the testator intended each successive charity in the list to get its whole legacy less legacy duty before the next charity got anything, and so on down the list.

The result will be that the estate duty payable on the cesser of these respective lives will in substance fall on the later charities, and none on the earlier.

(1) [1903] 2 Ch. 135.

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That is the best conclusion that I can arrive at, and there is nothing in *Berry* v. *Gaukroger* (1) to prevent me putting that construction on clause 9.

As this is purely a matter of the construction of the will the costs of all parties as between solicitor and client must be paid out of residue.

Solicitors: *Savery, Stevens & Nutt; Golding, Hargrove & Golding; Waterhouse & Co.; Ranger, Burton & Frost; Breeze, Wyles & Raggett.*

G. R. A.

CLAUSON J.
1929
March 7.

In re GOOCH.

GOOCH *v.* GOOCH.

[1928. G. 2350.]

Will—Referential Trusts—Settlement—Share of Residue to be paid to Trustees of Settlement upon Trusts of same so far as then applicable and capable of taking Effect—Divorce—Order varying Trusts of Settlement—Accretion or Independent Settlements.

A testator bequeathed his residuary estate upon trust for his children in equal shares and declared that as to the share of his son E. a moiety thereof should be held upon trust to pay and make over the same to the trustees of a settlement dated September 23, 1916, to be held by them upon the trusts of such settlement, so far as the same should be then applicable and capable of taking effect.

By the settlement so referred to, which was made after the marriage of E. with his wife G., a certain fund was vested in the trustees thereof under which E. took the first life interest and upon his death G. took an interest during her widowhood with remainders over upon trusts for E.'s children by his wife G. or any future wife.

The testator died in 1917, and in 1928 the marriage was upon G.'s petition dissolved and an order was made under which the trusts of the settlement were varied; the effect of this variation being to deprive E. of any interest under the original trusts thereof, to give G. an immediate life interest and to vest the settlement fund after her death in P. the only child of her marriage with E.:—

Held, that upon the proper construction of the testator's will, the share of E. in his father's residuary estate ought to be held upon the trusts of the settlement as originally framed without regard to the order varying those trusts.

ADJOURNED SUMMONS.

Charles F. Gooch by his will dated May 5, 1908, gave his residuary estate to trustees in trust for all his children who

(1) [1903] 2 Ch. 116, 131, 135.

should attain the age of twenty-five years or marry under that age in equal shares. By a codicil dated October 17, 1916, the testator declared that the share of his son Eric in his residuary estate should be held, as to one moiety thereof in trust for him absolutely and as to the other moiety, in trust to pay and make over the same to the trustees for the time being of the settlement dated September 23, 1916, thereinbefore recited, to be held by them upon the trusts of that settlement, "so far as the same should be then applicable and capable of taking effect."

By the settlement so referred to in the codicil and made after the marriage of Eric Gooch with Gwynedd Gooch, his wife, a certain fund of 6000*l.* was vested in trustees upon trust to pay the income to the husband during his life, and after his death to the wife during her widowhood and, subject thereto, in trust for the issue of the husband as well by his wife Gwynedd as by any future wife, as he should by deed or will appoint, and, subject to any such appointment, in trust for his children by her or any future wife and, in default of any child then, subject to any general testamentary appointment by the husband, in trust for his statutory next of kin as therein mentioned. The settlement also conferred a power upon the husband, in case he should survive his said wife, to appoint the income of the settlement fund in favour of any future wife for her life or any less interest.

The testator died on April 12, 1917, leaving Eric Gooch and three other children him surviving.

By orders made on August 2, 1927, and March 24, 1928, by the Supreme Court of Kenya at Nairobi, upon the petition of Gwynedd Gooch, her marriage with Eric Gooch was dissolved; and by an order made by the same Court on June 29, 1928, also on the petition of Gwynedd Gooch, her husband consenting thereto, the trusts and provisions of the settlement were varied, the effect of the order being to deprive the respondent Eric Gooch of all beneficial interest and powers under the settlement and to give the petitioner, his former wife, an immediate life interest in the settlement fund and to vest the whole beneficial interest in that fund, upon her

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death, in the defendant Pamela Gooch, the only child of the marriage, upon her attaining the age of twenty-one years or marrying under that age.

On August 9, 1928, Eric Gooch, with the view of benefiting his said wife and their daughter Pamela, in case his settled share under his father's will and codicil should not be subject to the trusts of the settlement as varied by the order of June 29, 1928, executed deeds by which he appointed the fund representing that share, subject to the trusts having priority to the appointment, in favour of Pamela and assigned his life interest in the fund to his said wife and released his power of appointing a life interest in the fund in favour of a future wife.

The summons was taken out by Eric Gooch for the determination of, amongst other questions which arose upon the construction of the will and codicil of the testator, the question whether, in the events which had happened, the moiety of the plaintiff Eric's share in the residuary estate directed to be paid over to the settlement trustees ought to be held by them upon the trusts of the settlement originally declared therein or upon the trusts as varied by the order of June 29, 1928.

Gover K.C. and *R. R. Formoy* for the plaintiff Eric Gooch, who was also a trustee of the will. The plaintiff is desirous of making the best provision possible for his former wife, as evidenced by his execution of the deeds of August 9, 1928. We support the arguments of counsel for her and the trustees of the settlement that the will fund as well as the settlement fund is affected by the order of June 29, 1928.

In *In re Walpole's Marriage Settlement* (1) Joyce J. was of opinion that the effect of a direction that the property bequeathed should be transferred to the trustees of certain marriage articles to be held upon the trusts thereof did not make that property an accretion to the funds originally settled by those articles, but the effect of the direction was to create a new referential settlement of that property upon similar trusts.

(1) [1903] 1 Ch. 928.

W. G. Hart for Gwynedd Gooch. The question is purely one of construction of the testator's will. He has stated plainly what is to be done with Eric's share; that it is to be held upon the trusts of the settlement "then applicable and capable of taking effect." The word "then" refers to the date of the payment of the share to the trustees of the settlement. Therefore the trusts as varied by the Kenya Court are the trusts now applicable to Eric Gooch's share under the will of his father. The phrase "capable of taking effect" will be construed as meaning what the law allows to take effect and is not to be confined to the trusts in the settlement as originally stated. Here the direction in the codicil effected an amalgamation of the will fund with the settlement fund. The share was directed by the codicil "to be paid and made over" to the settlement trustees. The only case in which similar words have been construed appears to be *In re Finch and Chew's Coniract.* (1) The order of the Kenya Court had an effect upon the share under the will, corresponding with that of an assignment by a beneficiary for life of his interest to X., which would make X. a cestui que trust under the trust instrument.

C. Montgomery White for the trustees of the settlement. The trusts as originally set out in the settlement are the only trusts affecting the share under the will. The words in the codicil do not effect an accretion of the will fund to the settlement fund. If that were the case, the effect of the language used in the codicil would have the startling result pointed out by Russell J. in *In re Campbell's Trusts* (2) that an assignee of the husband's life interest in the fund settled by the settlement of 1916 could claim to be a cestui que trust thereunder in respect of his share under the testator's will.

C. E. Shebbeare for the defendant Pamela Gooch supported the argument of counsel on behalf of the mother.

CLAUSON J. On September 23, 1916, the late Mr. Charles Fulthorpe Gooch was minded to make a settlement upon his son Eric Daniel Gooch, his wife, Mrs. Gwynedd Gooch, and

(1) [1903] 2 Ch. 486. (2) [1922] 1 Ch. 551, 565.

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future issue. By that deed certain trusts were declared for the benefit of the spouses and their issue and also, to some extent, for the benefit of future issue of the husband by a future wife, if any. The settlement having been executed, the settlor proceeded a very short time afterwards, on October 7, that is to say, a fortnight afterwards, to execute a codicil to his will. I need not trouble about the terms of the codicil, beyond stating that he revoked certain previous testamentary provisions relating to the share of his son Eric Gooch in the residuary trust fund and declared that such share should be held, as to one moiety thereof in trust for his absolute use and benefit and as to the other moiety in trust to pay and make over the same to the trustee or trustees for the time being of the settlement of September 23, 1916, to be held by such trustee or trustees upon the trusts of such settlement "so far as the same shall be then applicable and capable of taking effect." At the moment when the testator died, on April 12, 1917, the trusts of the settlement were, in every sense of the word, applicable and capable of taking effect, and there was no difficulty at that date in reading those trusts into the will as applying to Eric's share in his father's residuary estate. Mr. Eric Gooch and his wife resided in Kenya, but I have no evidence before me one way of the other as to their domicil. The Court in Kenya has pronounced a decree dissolving their marriage and varying the trusts of the settlement of 1916. That Court, so I am informed—and I accept it for the purpose of this hearing—has under local ordinances precisely the same jurisdiction with regard to divorce and with regard to variation of settlements as this Court has in this country; and, indeed, I am told that the local ordinance with regard to the variation of settlements follows the words of the relevant statutory provisions which prevail in this country. I have not, however, before me materials which enable me to form any judgment whether or not the divorce decree was a valid one. Further, I have heard no argument to assist me in determining whether, assuming the divorce decree to be valid, the Court in Kenya had jurisdiction which would be recognized by this Court to vary a settlement executed

in England, the trustees of which are English. For the purpose of my decision I will assume that the decree of the Court in Kenya is binding just as if it were a decree of the English Court for the dissolution of the marriage between the spouses domiciled in this jurisdiction. The question which then arises and which the trustees of the settlement are anxious to have determined is whether the effect of the order of the Divorce Court varying the trusts of the settlement fund extended also to the husband's share in his father's residuary estate to which he was entitled under the trusts declared of that share by the codicil by reference to the settlement; with the result—if that were the effect of the order—that from and after the date of the order the wife became entitled for her life to that share in his place under and by virtue of the trusts declared by the codicil. It was contended that by reason of the terms of the codicil, the life interest of the husband under the settlement having now become the property of the wife, she, to the extent of that interest, is a cestui que trust under the settlement with the result that, in ascertaining what trusts are applicable to the fund which under and by virtue of the codicil has been transferred to the trustees of the settlement on the trusts of the settlement, the Court is bound to treat the trusts of the settlement as varied by the order as the trusts now applicable to the husband's share under the codicil. Now that argument leads to a very odd result, because it is perfectly plain from the whole tenor of the order varying the settlement that the Court and, presumably, the parties before it—because the wife was the applicant and the husband assented—intended to deal with and, in so far as the order shows, had not the slightest intention of dealing with anything other than the interests of the parties and the children under the settlement in the particular fund which was in fact settled by the settlement—namely, 6000*l.* invested in 5*l.* per cent. debenture bonds. The order varies the settlement in a particular way. Now, of course, if, as the result of the language used in the codicil, the order varying the interests of the parties in the fund originally comprised in the settlement must have the effect—totally unforeseen, as I suspect, either

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by the Court or by the parties—of varying the corresponding rights of those parties in the fund, for all I know, a much larger fund, which was settled by the codicil; if that must be the effect, as a matter of law, there is an end of the question; but, if I am forced to hold that to be the effect, then I can only say that the order would entirely fail to give effect to the intention either of the Court or of the parties to that order. However, as I read the language of the codicil, I do not feel myself forced to the conclusion that the language used has the effect so suggested. The argument is that the effect of the codicil is to put the will fund into the settlement, that from and after the testator's death every change in the beneficial interest in the particular fund originally settled will necessarily be accompanied by a corresponding change in the beneficial interest in the fund, which is added to the settlement fund by the codicil. I cannot accept that argument. I hold the words in the codicil to mean that the trusts imposed upon the fund are the trusts actually stated in the settlement and that the codicil does not impose upon the fund such trusts as may ultimately, in the course of the administration of the settlement fund, have to be regarded by the trustees of the settlement. By my own unaided efforts I should come to that conclusion, but I come to it with all the more satisfaction, because, in my view, any other decision would be contrary to the view expressed and, I think I may say, to the principle laid down by Russell J. in his decision in *In re Campbell's Trusts.* (1) I do not propose to travel through the facts of that case. I will merely content myself by saying that in arguing before Russell J. counsel for one of the parties who was contending in favour of the view which I am disposed to accept said (2): "If that were not so, an assignee or mortgagee of a share in the testator's residuary estate could claim to share in the other funds," and Russell J. says this (3): "In my opinion, upon the true construction of these wills, neither Eric nor Claude purported to exercise the power given to them by the memorandum

(1) [1922] 1 Ch. 551. (2) [1922] 1 Ch. 557.
(3) [1922] 1 Ch. 565.

of direction and the deed poll, and their widows could only succeed in claiming such an interest if Mr. Turner's argument, which was also put forward by Mr. Harman, were right." Then he proceeds to deal with that argument (1), which seems to me to be the argument, in substance, though in relation to different facts, of Mr. Hart in the present case :—" That argument was as follows : That, by virtue of the express language used in the memorandum of direction and in the deed poll, the trusts were that the funds thereby settled were to be treated as an addition to the corpus of the share of the residuary estate, and to follow its destination, and that, therefore, an effective appointment of a life interest in the residuary estate crystallises the trusts upon which, under the memorandum of direction and the deed poll, the funds, the subject of the trusts, are to be held. The effect would be that the wife would not take a life interest in those funds under an appointment in her favour in her husband's will, but would take it as a cestui que trust under the memorandum of direction and the deed poll, by reason of the fact that in the events which had happened she was a cestui que trust for life in regard to the residuary estate. That is a somewhat startling proposition. It really amounts to this, that an assignee of a cestui que trust under the trusts of the will, in regard to the residuary estate, could claim to be a cestui que trust under the memorandum of direction and the deed poll. It would also have the result that although, under the memorandum of direction and the deed poll, the trust funds subject to their operation are to be subject to the same trusts and powers as were contained in the will concerning the residuary estate, yet they would not be subject to a power of appointment, because the whole of this argument depends on the fact that the power of appointment given by the will, and exercised in respect of the residuary estate, crystallises the trusts upon which the trust funds are to be held under the memorandum of direction and the deed poll, and, although the memorandum of direction and the deed poll fund are settled by reference

(1) [1922] 1 Ch. 565.

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to the trusts of the residuary estate, it would not be open to one of the sons to appoint the residuary estate one way and the deed poll fund another. That would be an extraordinary result, which I do not think I should bring about unless I am driven so to do by the terms of the memorandum of direction and the deed poll." His Lordship then continued to study the terms of the document in order to see whether he should come to that conclusion. I, in the same way, hold that I am not driven to come to the startling conclusion put forward by Mr. Hart. I am, accordingly, of opinion that upon the true construction of the will and codicil in the events which have happened, the moiety of the share of residue of the plaintiff, Eric, directed to be paid over to the trustees of the settlement and to be held by them upon the trusts of such settlement "so far as the same shall be then applicable and capable of taking effect," ought to be held upon the trusts of the settlement as originally declared without regard to the order of June 29, 1928, made in the matter of *Gooch* v. *Gooch* in His Majesty's Supreme Court in the Colony of Kenya. But this declaration is to be without prejudice to any question whether the said decree is to be treated in this Court as a valid decree binding upon the persons claiming under the settlement of 1916.

Solicitors: *Merrimans.*

H. C. H.

END OF VOL. I.